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Stitt v. Reconstruction Finance Corp. No.540

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 539

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON AND WILLIAM M. GREVE, INDIVIDUALLY AND AS TRUSTEES, ETC., PETITIONERS,

vs.

RECONSTRUCTION FINANCE CORPORATION

No. 540

THEODORE STITT, PETITIONER,

vs.

RECONSTRUCTION FINANCE CORPORATION.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONS FOR CERTIORARI FILED OCTOBER 24, 1935.

CERTIORARI GRANTED DECEMBER 9, 1935.

SUPREME COURT OF THE UNITED STATES

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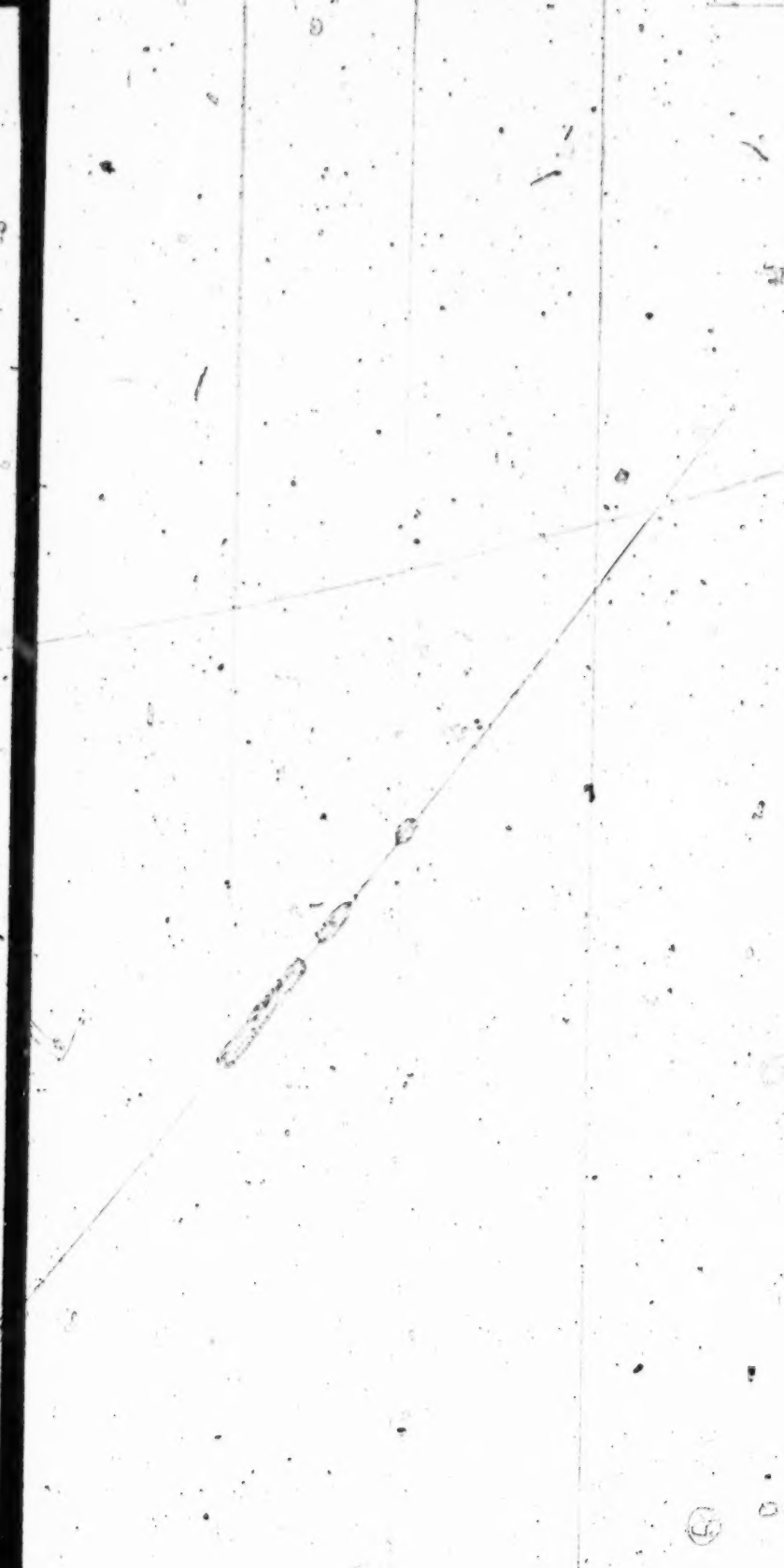

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of ALLIED OWNERS CORPORATION, Bankrupt

In the Matter of ALLIED OWNERS CORPORATION, Debtor

RECONSTRUCTION FINANCE CORPORATION, Appellant,

against

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON and WILLIAM M. GREVE, Individually and as Trustees in Bankruptcy and as Trustees in Reorganization of Allied Owners Corporation, Goldwater & Flynn, Robert P. Levis, Cullen & Dykman and Theodore Stitt, Appellees

STATEMENT UNDER RULE XIII

This appeal is from four orders entered by the United States District Court for the Eastern District of New York, in the bankruptcy proceeding and in the proceeding under [fol. 2] Section 77B of the Bankruptcy Act, both relating to Allied Owners Corporation. These orders include two orders of March 11, 1935, entitled in both proceedings, one fixing allowances for services in the bankruptcy proceeding of Messrs. Stephen Callaghan, Percival E. Jackson and William M. Greve, the Trustees in Bankruptcy, Messrs. Goldwater & Flynn, their counsel, Robert P. Levis, Esq., attorney for the Bankrupt, Messrs. Cullen & Dykman, attorneys for William M. Greve in Special Proceedings, et al., and the other order fixing the compensation of Theodore Stitt, Referee in Bankruptcy, for his services in the bankruptcy proceeding. The third order of March 11, 1935, from which this appeal is taken, is entitled in the Section 77B proceeding only and directed the Trustees in the Section 77B proceeding to pay the said allowances for bankruptcy services fixed in the other orders of that date. The fourth order appealed from was entered May 13, 1935, entitled in both proceedings and denied the motion, brought on by petition and order to show cause, of Reconstruction Finance Corporation to vacate and set aside the three or-

ders of March 11, 1935, and to revise the allowances named therein.

On August 8, 1933, the above-entitled bankruptcy proceeding was commenced. On August 25, 1933, Messrs. Stephen Callaghan and Percival E. Jackson were elected and qualified as Trustees in Bankruptcy. The election on the same date of Mr. William M. Greve was disapproved by the Referee in Bankruptcy. Mr. Greve commenced "special proceedings" with Messrs. Cullen & Dykman as his attorneys to revise the Referee's order. The District Court having reversed said order, Mr. Greve qualified as a Trustee on September 14, 1933.

[fol. 3] On September 14, 1933, Messrs. Goldwater & Flynn were by order duly retained as attorneys for the Trustees in Bankruptcy. Robert P. Levis, Esq. acted as attorney for the Bankrupt in connection with its voluntary petition and throughout the bankruptcy proceeding.

On June 22, 1934, the above-entitled proceeding under Section 77B was commenced and superseded the bankruptcy proceeding. The Trustees in Bankruptcy were appointed Trustees in the reorganization proceeding and Messrs. Goldwater & Flynn were retained by them as their attorneys.

The Trustees in Bankruptcy, their attorneys, the attorney for the Bankrupt, Messrs. Cullen & Dykman, and others, having theretofore filed applications for allowances for services in the bankruptcy proceeding, Referee in Bankruptcy Theodore Stitt on February 4, 1935 caused notice to be given of a hearing upon such applications and of his own application for compensation. On February 15, 1935, the hearing was held before the Referee. At that hearing Reconstruction Finance Corporation, a creditor of Allied Owners Corporation, which had duly filed proofs of claim in both the bankruptcy proceeding and the Section 77B proceeding, and certain other creditors, appeared and objected to the making of the allowances as applied for.

On March 5, 1935, the Referee filed his report entitled in the bankruptcy proceeding only, and his own application for compensation, and on March 11, 1935, Judge Robert A. Inch entered the first three of the orders appealed from, fixing the allowances for bankruptcy services and directing the Trustees in reorganization to make payment thereof. The order directing payment required notice that the payment

[fol. 4] would be made on March 21, 1935 to be published and such notice was duly published in accordance with said order.

On March 20, 1935, upon petition of Reconstruction Finance Corporation, Judge Inch signed an order directing the persons to whom allowances had been made to show cause why the three orders of March 11, 1935, should not be vacated and set aside and the final allowances for bankruptcy services revised and reduced to legal and reasonable amounts. The said petition and order to show cause were entitled in both proceedings. The order to show cause contained a stay of payment of the allowances.

On April 19, 1935, the return date of the order to show cause having been adjourned from time to time, argument thereon was had before Judge Inch, and pursuant to his permission affidavits and memoranda were subsequently submitted.

On May 8, 1935, Judge Inch filed his memorandum decision and on May 13, 1935, he entered an order denying the motion of Reconstruction Finance Corporation in all respects. Said order contains a stay of payment of the allowances pending determination of any appeal and until further order of the District Court.

On June 6, 1935, the following action was taken by Reconstruction Finance Corporation with respect to the appeal from the said three orders of March 11, 1935, and the order of May 13, 1935: A petition of appeal and an assignment of errors was filed in the United States District Court for the Eastern District of New York. A copy of said petition and assignment of errors was filed in the Circuit Court of Appeals for the Second Circuit. A notice of motion for leave to appeal, returnable in the Circuit Court of Appeals [fol. 5] on June 10, 1935 (the next motion day), a petition to the Circuit Court for leave to appeal, and copies of the petition of appeal and assignment of errors, were served upon the attorneys of record for the opposing parties. A note of issue with respect to the motion for leave to appeal was filed with the Clerk of the Circuit Court.

On June 12, 1935, this Court filed its memorandum decision granting leave to appeal and on June , 1935, this Court entered its order granting such leave.

There has been no change of parties or attorneys herein. No bond has been filed as the appellant is a corporation

all the stock of which is beneficially owned by the United States (28 U. S. C. A. § 870).

[fol. 6] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

In the Matter of ALLIED OWNERS CORPORATION, Bankrupt-Debtor

Trustees' Statement of Services

PETITION OF TRUSTEES IN BANKRUPTCY FOR ALLOWANCE FOR SERVICES

To the Honorable, the Judges of the United States District Court for the Eastern District of New York:

On August 25, 1933, we, the undersigned, Stephen Callaghan, Percival E. Jackson, together with William M. Greve, were appointed unanimously in amount and number by all the creditors, the Trustees in bankruptcy of the above named Allied Owners Corporation, hereinafter referred to as the bankrupt. The Learned Referee approved our appointment but refused to approve Mr. Greve's appointment. We thereupon arranged with the Fidelity & Deposit Company of Maryland for the usual Trustees' fidelity bond in the sum of $100,000, and caused the same to be duly approved and filed. This enabled us to obtain Certificates of our appointment, which we did. An appeal was taken to the Court respecting Mr. Greve's appointment and the decision of the Referee reversed.

Having satisfied ourselves of the validity of our acts, we undertook to ascertain the current and tangible assets of the bankrupt in order that they might be collected, con- [fol. 7] served and protected. We attended at the Referee's office and at the District Court on the day of our appointment and for a considerable time thereafter spent all of our time, with little exception, in and about the business of the estate. Our investigation disclosed that the bankrupt had filed a voluntary petition in bankruptcy on August 5th preceding our appointment, and that there had been no application for or appointment of a Receiver; that

the officers of the bankrupt and its various depositaries had been in possession of its assets since the filing of the petition in bankruptcy. We found that there was on deposit in the Central Hanover Bank and Trust Company to the credit of the bankrupt, the sum of $336,237.23. We found that there were no claims or liens against these funds and that they constituted free assets in the hands of the Bank. The Central Hanover Bank and Trust Company requested that we simply transfer the credit to our account as Trustees, but we found that under the rules we were bound to keep the assets of the Estate within the Eastern District of New York and since the Central Hanover Bank and Trust Company had no branch bank within the Eastern District, we served upon them Certificate showing our appointment and arranged with the Central Hanover Bank and Trust Company for the withdrawal of these moneys. In addition, we notified and delivered Certificates of our appointment to the City Bank Farmers Trust Company, the Brooklyn Trust Company, the Corn Exchange Bank Trust Company and the Manufacturers Trust Company. We found cash or deposit in the Corn Exchange Bank Trust Company in the sum of $3,936, and cash in the Brooklyn Trust Company in the sum of $589. We arranged [fol. 8] with the Brooklyn Trust Company for the transfer of the credit of the bankrupt to us as Trustees, attended there and made the necessary arrangements for signature cards and identification. We withdrew the moneys from the Central Hanover Bank and Trust Company by means of two checks, each for $168,443.99. With one of these we opened an account in our names in the Lawyers County Trust Company, depositing therein also the $3,936.79 which we withdrew from the Corn Exchange Bank Trust Company, making a total of $172,380.78. We also deposited in the Brooklyn Trust Company one of these checks which, with the balance on hand there, made a total of $169,033.40. We arranged for printing of particular checks and the issuance of check books.

However, we had discussed the matter and desired to retain Messrs. Goldwater & Flynn as counsel, and they were good enough to agree to give us the necessary assistance as counsel in an informal manner pending formal retention without obligation to us in the event that they should not be finally and formally selected and approved.

In consequence, we had, in the determination of the various legal questions hereinbefore and hereinafter referred to and throughout the administration of this Estate, at all times the active, willing and complete cooperation, assistance and advice of counsel to whom are due no small measure of credit for the excellent results we feel have been achieved in the administration of this Estate, as will more fully hereinafter appear.

During this period we discussed at some length the question of the form that the physical administration of the [fol. 9] estate should take. We discussed the necessity of renting an office and retaining an office staff. If we did so we felt that we should need a stenographer, a bookkeeper and perhaps, a boy. Obviously, it was necessary to open a set of books. The affairs of the Estate were involved and complicated; there was a large amount of cash on hand, as appears above, and there were a considerable amount of securities, as hereinafter appears. There were a number of files, many original documents and instruments, the contents of which were to become increasingly important in connection with the litigation in which the Estate was to be engaged, as will also hereinafter appear.

However, on reconsideration, once we learned more about the affairs of the Estate, we came to the *the* conclusion that with the large amount of outstanding liabilities approximately $15,000,000, and the comparatively small amount of tangible and admitted assets, approximately $1,000,000, it would not do to encumber the Estate with administration expenses if avoidable. As the matter stood at the time of our preliminary surveys, it looked as if the equities of the Estate and all property, except the tangible cash and the Ringling note, to which we will advert later in more detail, might well be wiped out and we were unwilling to face the necessity of ultimately filing an account showing payments over a year or two, of rent for an office, stenographic and bookkeeping hire, expenditures for telephone and the like, in an Estate that might pay to the general creditors less than ten per cent. in dividends. In consequence, we determined and agreed that we would divide the administration of the Estate and its overhead cost be- [fol. 10] tween us, looking for our reimbursement to the allowances we should receive if the administration was successful, and charging them to profit and loss with the

other creditors, in the event that it should not be. Accordingly, Mr. Greve lent the facilities of his office and Judge Callaghan assumed the obligations of keeping the books, so that with the exception of Fifty Dollars a month paid to Mr. Buckbee, who was later retained because of his familiarity with the involved tax reports and potential liability of the corporation for tax items, and to check the theatre accounts and whose retention, we felt, would cut down the necessity of hiring accountants from time to time (and this subsequently proved to be so), we are glad to be able to report that not a single dollar of the Estate's money has been disbursed by the Trustees for clerical, bookkeeping or stenographic hire, rent, telephone, postage or other similar items.

With the assistance of counsel, we arranged to take possession of the physical assets of the bankrupt, made inquiry with respect to its securities, arranged for a safe deposit box in our own names in the Empire Safe Deposit Company, attended at the offices of the bankrupt and affiliated companies, talked with various of the officers, directors and employees thereof and with the attorneys and former attorneys for the company, obtained possession of the Minute Book, Seal, Stock Book and Stock Transfer Book; obtained possession of the files, and segregated them in a room which we obtained for the purpose at 331 Madison Avenue.

General Order XVII required the preparation of a complete inventory by the Trustees immediately upon entering their duties and also required that there be a report [fol. 11] by the Trustees to the Court within twenty days after receiving notice of appointment of "the articles set off to the bankrupt by him according to the provisions of the forty-seventh section of the act, with the estimated value of each article." This required a list of the exemptions claimed by the bankrupt, after investigation and on August 30th we prepared such report showing no exempt property and filed the same.

One of our first considerations was to see that the Estate was adequately protected by insurance. We found that Mr. Schmitz of the Remsen Brokerage Company, which was one of the subsidiaries or affiliates of the New York Investors, Inc., engaged in the general insurance business, had been handling the insurance of the corporation. We

arranged with him for an immediate transfer of interest to us as Trustees in pending insurance. We then undertook to obtain a record of the insurance in force and then and thereafter, from time to time, checked the insurance as against the property of the Estate and the value thereof, renewed the same, paid premiums thereon, saw to it that sufficient insurance was carried and paid for by persons other than the Estate for the benefit of the Estate where that was possible, saw to it that neither the amount of insurance nor the rates charged therefor were excessive, and generally throughout the period hereinafter referred to, kept in contact with the situation at all times so that the Estate might have adequate but not excessive protection from fire and other disasters and against injuries sustained by third persons which might result in liability of the Estate.

We found that the Estate was the owner of a note made by Ringling Brothers—Barnum & Bailey Combined Shows [fol. 12] and Circus City Zoological Gardens, Inc., upon which there was an unpaid balance of $1,117,320.67, and in which it was said that the bankrupt had an interest of $828,131.77. This note and the situation with respect thereto, then, for the first time became, and throughout the period of this administration, has been a matter that has involved a great deal of consideration and the devotion of a considerable amount of time and attention on the part of the Trustees and their counsel.

The note, of which we received possession, was made by two corporations: (1) Ringling Brothers-Barnum & Bailey Combined Shows, Inc. and (2) Circus City Zoological Gardens, Inc. It required the makers to jointly and severally pay to the bankrupt at the office of the Central Hanover Bank and Trust Company in the City of New York, the sum of $1,117,320.67 with interest at six per cent. per annum from December 6, 1931 on or before November 6, 1937. The interest was payable on the 26th day of May and November in each year, and when we went into possession of the Estate we found that no interest had been paid on the preceding May 26th, so that the note was in default. The note, by its terms, was to be amortized by payment on account of principal, of 33 1/3% of the net earnings during 1932 of Ringling Brothers-Barnum & Bailey Combined Shows, Inc., including therein the net earnings of certain

partnerships from January 1, 1932, and 50% of its net earnings in each year thereafter, and to be further reduced by the application of all the net earnings of the Circus City Zoological Gardens, Inc. There was a provision in the note for the determination of net earnings after providing for Winter and subsequent season renewal expense, taxes and [fol. 13] an amount for working capital for the first few weeks of the ensuing season. Our investigation disclosed that the situation with the circuses for the preceding years had been such that there was no profit and consequently no default in amortizing the principal.

The transactions out of which this note arose and the various questions with respect thereto, which were later largely to be matters of legal consideration of our counsel and our own business judgment and discretion, are not here adverted to because they were not then the subject of our investigation. At this time we were primarily concerned with collecting the assets and ascertaining our immediate rights with respect thereto, rather than concerned with our ultimate legal rights of enforcement and collection. We were, however, advised by counsel that the interest of Allied Owners Corporation in this note was only the sum of $828,131.77, and that the remaining interest therein, which appeared to be coordinate, was in a syndicate composed of various individuals. The interests of the syndicate were evidenced by a syndicate agreement dated September 17, 1929, of which New York Investors, Inc., were appointed Syndicate Managers and then and thereafter there was deposited with New York Investors, Inc., under a contract made July 14, 1932, between John Ringling and New York Investors, Inc., a list of securities which were described in Exhibit 2 thereunto annexed, under an agreement simply, but not perfectly stated, that the same should be held as collateral security for the payment of the note. New York Investors, Inc. had also guaranteed the note as had John Ringling.

New York Investors, Inc., itself, as will be hereinafter indicated, we found to be in equity receivership and we [fol. 14] communicated with Judge Charles H. Kelby and Mr. Clifford S. Kelsey, its receivers in equity, with respect to these matters and this collateral and satisfied ourselves, at least for the moment, that the collateral being in safe hands, the matter could be taken up in the course

of our administration of the Estate and after we had an opportunity to make a more detailed investigation. Counsel obtained for us detailed lists of the collateral and we checked those lists as against documents which we found in the files. We also found in the course of this investigation that there had been an agreement between the bankrupt, New York Investors, Inc., as the Syndicate Managers, John Ringling and the Manufacturers Trust Company and the Resource Holding Corporation, a subsidiary or affiliate of the Manufacturers Trust Company dated September 20, 1932, whereby an interest of .28173% in the subsequently depos-ted collateral had been allocated to the Manufacturers Trust Company. We communicated with Ringling Brothers—Barnum & Bailey Combined Shows, Inc., Manufacturers Trust Company and Judge Kelby and Mr. Kelsey, letting them have Certificates of our appointment so as to substitute ourselves for the bankrupt and maintain the existing status quo.

We found that there had been loans by the bankrupt to officers, directors and/or employees of Allied Owners Corporation or other affiliated or subsidiary companies of New York Investors, Inc. We found that there was on hand a note of Francis T. Pender who had been President of the bankrupt corporation from March, 1931 to the date of bankruptcy, and who had also been a director thereof for almost the entire period of its organization. It appeared that Mr. Pender had borrowed $50,000 and had [fol. 15] given therefor his note dated December 31, 1931. This loan had been made pursuant to a prevailing practice of large corporations which, at the time of the stock market collapse, were, for purposes of general morale, giving assistance to their employees who had had large investments in their stock and other securities and who were threatened with being wiped out as a result of the loss of values.

This note called for payments of $250 a month. The principal had been reduced by payments to $36,517.94, and there was held as collateral thereon, twenty $1,000 Allied 6% bonds due in 1945.

The situation with respect to Mr. Pender's note was largely the same concerning the note of Mr. Charles A. Chase, an employee of Realty Associates, Inc., in the sum of $37,000, dated November 30, 1932, on which payments

of $185 per month were required and upon which there was an unpaid balance of $22,666.57. Respecting this note, we came into possession of collateral security consisting of twenty-five shares of New York Investors, Inc., First Preferred Stock, ten shares of New York Investors, Second Preferred Stock and two thousand two hundred fifty shares of New York Investors Common Stock, all of which, by virtue of the equity receivership of New York Investors, Inc., had little value, and the market value of which was nominal.

We also found a note of Teresa Mahoney who was also an employee of Realty Associates, Inc. This note had originally been for the sum of $5,750 and was dated November 30, 1932. At this time there was due and unpaid thereon $2,810.43. On this we came into possession of collateral consisting of three $1,000 Allied 6% bonds due in 1945, $970.89 of Prudence-Bonds Corporation First Mortgage [fol. 16] Bonds, $100 Realty Associates Securities, Inc., 6% bond due in 1939, and six shares of Preferred Stock of Prudence Company, Inc.

We also have a note of Clemens F. Schmitz, an employee of the Remsen Brokerage Company, who has been hereinbefore referred to. This was originally in the sum of $38,793.36, dated November 30, 1931, and this Mr. Schmitz had reduced to $29,699.94, and we received as collateral eight $1,000 Allied 6% bonds as security.

We also received a note of Thomas H. Long, an employee of Realty Associates, Inc., for $1,000, dated November 30, 1932, which had been reduced by payment to $442.40, and on which we received 135 shares of New York Investors, Inc., Common Stock.

Counsel reported to us that investigation disclosed that there had been a verbal agreement in November, 1932, between the bankrupt and the various obligors on these notes, whereby the bankrupt agreeing to defer payment of principal and reducing interest to 2% per annum, so long as interest was paid.

All of these people continued to pay the accrued interest on their notes at the reduced amounts and it was a question of whether there was any default in view of the agreement of modification, aside from the legal question of the validity of such an agreement. In any event, they were all still connected with the various companies and the collateral

was on hand and we knew of no reasons that required immediate or drastic action, so that we deferred these matters for later consideration.

There were also three notes of Mr. Frederick Joerissen who had been Assistant Treasurer of New York Investors, Inc., but who was no longer connected with it. These aggre-
[fol. 17] gated $15,800 and were made in 1931 and no payment had been made thereon either for principal or interest and they were in default. The 750 shares of New York Investors, Inc., Common Stock were of no value and these notes were referred to our counsel for attention upon their retention, in connection with the investigation of legal situations necessarily arising from the very nature of all the transaction.

We likewise found on hand Certificates of Interest in bonds of the Prudence Company which were issued as a result of a general savings plan in compliance with which employees paid in a portion of their salaries for the purchase of bonds of The Prudence Company. These were held in a separate fund. The plan was eventually abandoned and the employees were given Certificates evidencing their interest in the fund which was held by a committee of three appointed by the certificate holders, which consisted of Frank Fox, who was President of Realty Associates, Harry E. Merriam, also a Vice President of the Prudence Company and Francis T. Pender, who was a Vice President of The Prudence Company. Allied Owners Corporation acquired $92,221.34 face amount of these Certificates and at the time of the bankruptcy we came into possession thereof.

We also came into possession of $100,500 face par value of First Mortgage real estate six per cent sinking fund Gold Bonds of the bankrupt due July 1, 1945 which the corporation had acquired from time to time at a total cost of $81,477.80.

We also found on hand $1,500 face value of the so-called debentures, the second mortgage bonds issued by the bankrupt and which were carried by the corporation at a cost of approximately $900.

[fol. 18] All of these notes and certificates will be found to be listed in detail in the inventory filed with our First Report. We obtained possession of these securities and put them in the Trustees' safe deposit box.

In connection with the real property of the corporation, we found that three of the theatre buildings: Loew's Pitkin, which is a theatre located at Saratoga, Pitkin and East New York Avenues and Barrett Street, Brooklyn, Loew's Kings, which is a theatre located at Tilden and Flatbush Avenues, East 22nd Street and Duryea Place, Brooklyn and Loew's Valencia, which is a theatre located at Jamaica Avenue, Merrick Boulevard and Bergen Avenue, Jamaica, each being a large building, were occupied by the Loew motion picture interests under written contracts, with Loew's in possession, and there was nothing we were required to do in a physical way with respect to these theatres. The problem as to these theatres was a complicated legal one.

We found, however, that the bankrupt was the owner of what was known as the Brooklyn Paramount Theatre and Office Building, a large building located at DeKalb and Hudson Avenues, DeBevoise Place and Lafayette Street, Brooklyn, in which was located what was known as the Brooklyn Paramount Theatre. The office portion of the building was eleven stories in height. The Brooklyn Manhattan Transit Company occupied the fifth to eleventh floors at a rental of $120,000 per annum, the lease expiring April 30, 1949. The third and fourth floors were occupied by the Brooklyn Queens Transit Company, a subsidiary or affiliate of the Brooklyn Manhattan Transit Company, under a lease calling for a rental of $23,500 per annum and expiring April [fol. 19] 30, 1939. There are three stores, of which two were occupied, and there are miscellaneous office tenants on the second floor. We found that the building had been managed by the Realty Associates Management, Inc., since the preceding June, and we promptly communicated with that corporation, sending them a Certificate of our appointment and notifying them that we had acquired title to the property, and that they were to account to us.

Our counsel looked into that situation and found that Realty Associates Management, Inc., was a domestic corporation with a capitalization of 1,000 shares of common stock, all of which were owned by New York Investors, Inc.; that it was headed by Mr. Gordon S. Braislin.

We found that the Brooklyn Manhattan Transit Company lease was considered a very favorable one to the bankrupt estate; that there had previously been an arrangement allowing them a deduction of $30,000 on the rent in exchange

for themselves operating the office portion of the building, but that this arrangement had been abrogated, throwing the burden of management on the bankrupt. There were rumors that the Brooklyn Manhattan Transit Company would welcome an opportunity to avoid its obligations under the lease and we determined to be scrupulous in seeing that all our obligations to them should be discharged so that there might be no possibility of their avoidance of obligation for any fault on our part.

We found that the theatre portion of the building had been formerly operated by Paramount Publix Corporation during the period of its continuance in active business. This theatre and office building was one of the properties affected by the contract between the bankrupt and Paramount Pub- [fol. 20] lix Corporation, to which we will later refer, and the vendee had been in possession of the building and property including the theatre, until its failure to perform the contract made by the Corporation with Allied Owners Corporation by the Trustees in bankruptcy of Paramount Public Corporation. This attempt to throw the operation of the theatre back to the bankrupt complicated the situation and prior to our appointment there had been an arrangement with the Paramount Publix Trustees for operation of the theatre so as to minimize any possible damage. We found that the form that this had taken had involved the incorporation of a small domestic business corporation, known as Extension Theatres Corporation which had a capital stock consisting of four shares of stock, of which two shares were designated as Class A and were owned by the bankrupt, and two shares were designated as Class B and were owned by the Trustees of Paramount Publix Corporation, each of which had paid $20.00 as the consideration therefor. In order to finance the operation of theatres, the Paramount Trustees and the bankrupt had each advanced on a note to Extension Theatres Corporation the sum of $7,480, making a total investment of $7,500 by each interest.

Then, and on August 7, 1933, a lease had been made between the bankrupt and Extension Theatres Corporation covering the theatre and equipment, for a term of forty weeks from September 1, 1933, at a rental equal to 15% of the gross receipts, less admission taxes, payable weekly on or before Wednesday of each week for the preceding week. We obtained possession of this lease and with our

attorneys examined into its terms. Then and later, with the assistance of counsel, we investigated as best we could as to the possibility of making some better arrangement, discussed the matter in detail with the officers and em- [fol. 21] ployees of the bankrupt, communicated with Mr. Mortimer A. Shea, the President of Extension Theatres Corporation and finally came to the conclusion that it was of paramount importance to keep the theatre open; that the ability to operate a motion picture theatre at a profit dependent on the pictures that could be obtained and since we had no facilities for obtaining other pictures, and since Paramount had agreed to furnish its pictures as part of the deal, taking an equal share of the net receipts with us, ours representing the rent of the theatre and theirs, the rent of the picture, it would be advisable to affirm and go along under the lease.

This brought up the question of whether we should ourselves, undertake the operation of the office building and the collection of rent. Our investigation respecting Realty Associates Management, Inc., convinced us of the efficiency and honesty of its organization, and we came to the conclusion that its familiarity with the operation of the building justified our retaining it. We arranged, however, that its compensation should be such as we were authorized to pay and made an agreement that there should be no personal liability on our part beyond such arrangement as might be affirmed by the Referee. We had our counsel prepare and delivered to the Realty Associates Management the necessary orders on the various tenants and arranged with them to proceed accordingly.

We also found that we had title to Birmingham Paramount Theatre, which, we were informed, consisted of a site and theatre building located at Third Avenue and Nineteenth Street, Birmingham, Alabama. This had also been sold to Paramount Publix Corporation and operated by it [fol. 22] under the general underlying agreement and had likewise been relinquished by the bankruptcy Trustees of Paramount. A similar arrangement had been made by the bankrupt with the Paramount Publix Trustees before our appointment and in consequence we received a lease made by the bankrupt with the Birmal Theatre, Inc., a Florida corporation, for a period of one year at a guaranteed rental of $45,000 per year, payable in equal weekly instalments,

with an agreement for additional rent equal to 15% of the gross receipts. We communicated with Mr. Freeman, who was in the employ of the Paramount Trustees and in charge of this operation. We found that the Birmal Theatre, Inc., was a wholly owned subsidiary of the Paramount Trustees and we had no interest therein nor did we finance it as with the Extension Theatres Corporation. We obtained this lease and with our counsel went over its terms, conditions and provisions and after similar investigation, as in the case of Brooklyn Paramount, which we made over a subsequent period, we came to the conclusion that it offered the best possible deal for the Estate, at least for the moment, and affirmed the lease. That this was so is evidenced by the fact that the term of the lease has since been extended upon similar terms and conditions and the theatre is now being operated under that arrangement.

There were two other theatres; one at Glens Falls, New York, located at Ridge and Maple Streets, Warren County. This had also been the subject of the general Paramount contract and had been operated by Paramount until its bankruptcy. This theatre, too, had been leased by the bankrupt immediately preceding the bankruptcy, to the Upper New York Theatres Corporation, another Paramount Trustees subsidiary, in charge of Mr. Freeman, for a term of [fol. 23] one year from September 1, 1933, at a rental of $12,000, with provision for additional rentals equal to 15% of the gross receipts. This lease, too, we obtained, we investigated the situation, and came to the conclusion that it should be continued. This theatre is also being similarly operated for an extended period upon the same terms.

The remaining parcel was a site at Birchard Avenue and Front Street, in the City of Fremont, State of Ohio, and upon which was erected a theatre known as the Fremont-Ohio Paramount Theatre. This building also contained two stores, one occupied by one, Barbara Miller, known as 305 South Front Street, under a lease which had expired (the tenant was in default in payment of rent) and another lease to one, Fred Hammer, known as 301 South Front Street, under an expired lease, with the tenant also in default in payment of rent.

We found that Mr. Shea had been operating this theatre on a monthly basis under a verbal agreement at a rental of 12 per cent of the gross receipts. The bankrupt had not

made an arrangement with Paramount respecting this theatre, and after an investigation of that situation and finding that Mr. Shea controlled a competing theatre in Fremont and was able to get his own pictures, we continued the temporary verbal arrangement with Mr. Shea until such time as we could make a permanent agreement, which, as a result of Mr. Shea's ownership of the competing theatre, really required his cooperation or consent. This will be hereafter more fully referred to.

Having given attention to the physical requirements of the situation, we turned our consideration to other and [fol. 24] collateral matters. As we pointed out, the Loew Theatres needed no physical care. They were in the possession of one of the Loew corporations. We found, however, that taxes had not been paid since May, in violation of the agreement under which Loew held and that monthly instalments on account of the purchase price of these three theatres amounted, for the Loew Kings Theatre, to $20,983.47 per month, for the Loew Pitkin Theatre, to $18,873 per month, and for the Loew Valencia Theatre, to $18,228.81 per month, and that there was unpaid and past due the June, July, August and September first payments, a total of $232,341.12.

We were told that suits were pending for the June and July instalments. We communicated with Mr. Alfred T. Davison, who had been the attorney for the corporation in these suits, and notified him of our appointment and requested him to advise us of the existing situation.

Meanwhile, we had presented the necessary papers for the retention of Messrs. Goldwater and Flynn, as counsel and to have them formally appear for us.

Since that time, we have made it a consistent practice to observe what we considered the spirit of the Bankruptcy Law, so that the various acts of the Trustees would represent, not merely a majority, but where possible, a unanimity of their opinion and of their counsel and with that in mind we have made it a custom to communicate with each other and with counsel constantly, keeping each other apprised of our various acts, acting in unison, so far as possible, so that the various proceedings had as herein recited, and many of those taken by counsel, were participated in by all of the Trustees and a representative of [fol. 25] counsel, so far as that was practicable. To this

practice we ascribe the unanimity of opinion and what we consider the successful consummation of the policies agreed upon and the proceedings initiated in consequence.

Throughout the administration of the Estate, we have had communications from, to and conferences with creditors and their representatives, too numerous to tabulate or mention. Similarly with officers and employees of the various companies affiliated with the bankrupt, with persons familiar with the motion picture industry, with details of which, at least to some extent, the Trustees other than Mr. Greve, were obliged to familiarize themselves, and with persons familiar with the details of the real estate business with which, by virtue of the large holdings of the company, the Trustees, other than Mr. Greve, were likewise obliged to inform themselves in order that their opinions might be of value and justified by good practice in those particular industries.

Throughout the period of our administration, we have given the necessary attention to seeing that all payments due to the Estate were received and the necessary disbursements made. The extent of those receipts and disbursements are shown by our account, and for brevity we avoid hereafter mention of the conferences, discussions and negotiations with various persons necessary to make adjustments and effect collections from time to time, except in exceptional situations.

We found that Mr. Alfred T. Davison was the attorney for the bankrupt in the actions pending against Loew's, Inc.; that one action had been instituted in the United States District Court for the Eastern District of New York to recover from Loew's Theatre & Realty Corporation, [fol. 26] Loew's Inc., and Paramount Publix Corporation Trustees, the instalments due from Loew's as aforesaid, on June 1, 1933, and the amount of the taxes on the three Loew properties which had accrued on May 1, 1933, to wit: $52,130.

We also found that on July 3, 1933, Mr. Davison had instituted an action in the Supreme Court of the State of New York, County of Kings, on behalf of the bankrupt, against the same defendants to recover the instalments of the purchase price which had become due on June and July 1st (the instalment for June being a duplication), as well as the taxes (also a duplication); that the defendants had petitioned for removal of the second action to the

United States District Court for the Eastern District of New York; that the petition for such removal had been granted and that in consequence, both actions were then pending in the said court. No actions had been brought for the August and September instalments.

We talked and communicated with Mr. Davison in an effort to get him to turn the papers over to our attorneys so that the answers about to be served by Loew's might be served upon us and so that we could serve the necessary replies within the time limited therefor, and likewise, so that the pleadings and other papers in the case could be examined to enable us and our attorneys to determine for ourselves what our responsibility was and what our course of action should be. Mr. Davison, however, felt that he might be waiving some rights by turning over the papers without remonstrance and in consequence we arranged to make the necessary motion which our attorneys did, for our substitution as plaintiffs and the substitution of our attorneys instead of Mr. Davison. Mr. Davison wanted us [fol. 27] to agree to a fee of $10,000. We discussed the matter with counsel and had them investigate generally the services that he had rendered and came to the conclusion that we could not make such an agreement without recourse to the court, in consequence of which we instructed our counsel to proceed with their motion, meanwhile, in an effort to assist us, Mr. Davison turned over the necessary papers to us as a loan and we examined the files and papers, in conjunction with our counsel.

Promptly upon our appointment, we had communications from the attorneys for the Manufacturers Trust Company, who advised us that they were acting as the Trustee under the Indenture of Mortgage which secured the outstanding First Mortgage Bonds; that there had been default in payment of taxes and interest, and that it, as Trustee, purposed promptly instituting foreclosure actions; that it was engaged in getting the facts in shape and that it was going to apply for the appointment of a Receiver to take charge of all seven properties, depriving us of the custody and control thereof; that meanwhile, in compliance with the decisions of the New York Supreme Court which required a mortgagee to translate the assignment of rents in his mortgage into a physical entry or equivalent legal possession, the Manufacturers Trust Company informed us that it proposed to move for segregation of the funds we were

collecting and for other incidental relief. Unfamiliar, as we were, with the details of our situation, we knew nevertheless that such action in its results would be serious in the extreme. But before we could apprise ourselves of the facts, and take the matter up with the Trustee, even before we had been able to retain counsel, we were served with a [fol. 28] set of motion papers in which the Manufacturers Trust Company stated these facts and stated that it intended to apply to this Court for permission to institute a foreclosure action, that it was assembling the facts in order to present the same to the Court; and that by virtue of the provisions of the said Indenture of Mortgage, upon the bankruptcy of Allied Owners Corporation, all of the rents, issues, profits, earnings, income and revenue from the mortgaged property belonged to the Manufacturers Trust Company, as Trustee; that it was entitled to the appointment of a Receiver; that it intended to apply therefor as soon as it received permission so to do, and meanwhile, it petitioned the court to require the Trustees to segregate all funds of the bankrupt received from any and all the real properties and deposit the same in a separate account for the benefit of the Manufacturers Trust Company, as Trustee under the First Mortgage Indenture or for the benefit of the Receiver who might be appointed, and also asking permission to institute the foreclosure action and apply for the appointment of a Receiver.

Thereupon, with our attorneys, we undertook a study of the entire situation. We had obtained, as aforesaid, the files of the bankrupt. We combed these files for every instrument and paper bearing upon the organization of the bankrupt and its subsequent proceedings, its contracts and agreements and its subsequent acts and conduct. Under the pressure of the attitude of the Manufacturers Trust Company, from which we could get no voluntary relief, but negotiation or persuasion because in the minds of its attorneys it was paramount that they should get some such order as this immediately for the protection of the bondholders, we and our attorneys commenced and engaged in [fol. 29] an intensive and minute examination and study of all of these records and documents and with the assistance of counsel, went into the question of their contents and their legal effect. Briefly stated, we found in substance:

On January 27, 1927, New York Investors, Inc., a domestic corporation, then known as Realty Associates, Para-

mount Publix Corporation, a domestic corporation then known as Famous Players Lasky Corporation, and one Thompson Starrett Company, Inc., a domestic corporation, made an agreement, by the terms of which Paramount, which was then anxious to obtain control of motion picture theatres in the New York territory, in an effort to compete with the Loew Corporations in that field, obtained the agreement of New York Investors, Inc., that it would acquire certain building sites and cause Thompson Starrett to erect thereon buildings available for use as motion picture theatres, the understanding being that New York Investors should finance the purchase of the land and the construction of the buildings, that Paramount should contribute the amount necessary to pay for the equipment of the theatres; that the completed structures should then be sold to Paramount at stated prices computed and based upon cost, which should be payable over a period of fifteen years in monthly instalments equal for one hundred and eighty payments, with a 50 per cent instalment as the one hundred and eighty-first payment, subject to deduction in the event of mortgages remaining at the time of delivery. The agreement further provided that pending delivery of title (which was to be concurrent with the payment of the full purchase price on the making of the one hundred and eighty-first payment) the vendee should be allowed into possession under leases.

[fol. 30] This initial agreement was followed by the execution and delivery of building completion agreements entered into between New York Investors and Thompson Starrett. It was supplemented, after the bankrupt, Allied Owners Corporation was formed (the original agreement contemplated that New York Investors should form a separate corporation to carry it out and Allied Owners Corporation was organized for the purpose) by leases in which the bankrupt was landlord and Paramount the tenant. There were four of these leases executed dated June 8, 1927, one affecting what afterwards became Loew's Valencia Theatre, another, what afterwards became Loew's Kings Theatre, a third, what afterwards became Loew's Pitkin Theatre, and the last, what afterwards became Brooklyn Paramount Theatre and Office Building.

On the same day (June 8, 1927), the January 27, 1927 agreement was modified. There were additional leases thereafter made covering Birmingham Paramount and

later leases covering Fremont & Glens Falls Theatres. The various leases were modified by modification agreements, the first group on July 25th and August 5, 1927.

Pursuant to the arrangement, Allied Owners Corporation acquired the seven sites to which we have made reference, buildings were erected thereon, and the same were equipped, pursuant to the arrangement, for use as motion picture theatres. The purchase of the sites and the erection of the buildings were financed by Allied Owners Corporation by authorizing the issuance of $14,000,000 of first mortgage 6 per cent bonds, of which nine and a half million were actually issued and sold to and through Halsey, Stuart & Company. These bonds bore interest at 6 per cent per [fol. 31] annum, payable semi-annually and were in bearer form with coupons attached, with the usual provisions for registration. They were secured by an Indenture of Mortgage bearing date as of July 1, 1927, delivered August 8, 1927, to the Manufacturers Trust Company, a banking corporation in the City of New York, as Trustee, and there was mortgaged by such Indenture the fee simple of the five of the seven parcels: the three Loew parcels, i. e. Loew's Kings, Pitkin and Valencia Theatres, the Brooklyn Paramount Theatre and Office Building and the Birmingham Paramount Theatre. The right, title and interest of Allied Owners Corporation in the leases and modifications thereto covering these parcels were also pledged under the Indenture of Mortgage. These first mortgage bonds were due in 1945. There were provisions therein for the creation of a sinking fund by allocation of varying amounts of payments which were designed in the aggregate to retire at least 27½ per cent of all the bonds issued, prior to maturity.

The venture was further financed by Allied Owners Corporation being authorized to issue $3,700,000 of so-called Debentures, in ten series, of which $370,000 in amount constituted each series, and of which one series matured on the 1st day of January in each year from January 1, 1931 to January 1, 1940. These bonds likewise bore interest at 6 per cent per annum and while termed Debentures, were in fact secured by the Indenture of Mortgage, a second lien on the same five properties, pledged under the First Mortgage Indenture. The Bank of America, a banking corporation in the City of New York, was the Trustee under this Indenture of Second Mortgage. This trusteeship subse- [fol. 32] quently vested in the City Bank Farmers Trust

Company by virtue of succession. The five leases and modifications were also pledged under this Indenture. These debentures were also issued and sold to and through Halsey, Stuart & Company.

On the same day (August 8, 1927), Allied Owners Corporation also delivered its bond conditioned for the payment of $825,000 to New York Investors, Inc. Payment of this bond was secured by a mortgage constituting a third lien on the five parcels aforesaid.

The two additional parcels: the Glens Falls and the Fremont Theatres, were completed and these, too, were the subject of similar leases in which Allied was lessor and Paramount, lessee. The construction of these two additional theatres, however, was financed by moneys said to have been advanced by Realty Associates, Inc., for which the bankrupt executed a blanket mortgage of $250,000 covering both parcels, and individual second mortgages of $25,000 each. These mortgages were taken and held by the affiliated companies and did not represent bonds in the hands of the public.

Thereafter and after some controversy, the capital account of the various theatres was agreed upon by and between Allied and Paramount (Loew's was also a party to this agreement), and the following sums arrived at:

Loew's Kings	$5,046,032.38
" Valencia	4,374,914.52
" Pitkin	4,529,519.70
Brooklyn Paramount	11,866,751.98
Birmingham Paramount	3,037,761.03
Glens Falls	499,001.16
Fremont	441,035.24

[fol. 33] Under the agreements, Paramount was to start making monthly payments at the specified instalments immediately after completion of the theatres, and as to the Loew's Kings, Loew's Pitkin and Birmingham Paramount, payments were started in January, 1928, as to Loew's Valencia, in October, 1928, as to Brooklyn Paramount, in November, 1928, and on Fremont and Glens Falls, in January and February, 1932, respectively.

However, before the completion of Loew's Kings, Loew's Valencia and Loew's Pitkin Theatres, Paramount made an agreement with Loew's Theatre & Realty Corporation, a

subsidiary of Loew's, Inc., whereby Paramount assigned to Loew's Theatre and Realty Corporation its interest in the three theatres now known as the Loew Theatres, to wit: the Valencia, Kings and Pitkin and in the agreements and leases with Allied with respect thereto. By virtue of this agreement Loew's Theatre and Realty Corporation assumed all of Paramount's obligations to Allied with respect thereto and Loew's, Inc., by separate instrument, guaranteed performance to Paramount by Loew's Theatre and Realty Corporation. Paramount, however, was not released of its obligations to Allied under the existing agreements and leases.

Under completion of these three theatres, Loew's went into possession of them and started to make the monthly payments called for by the agreements. It made the monthly payments of the purchase price directly to Allied, and likewise paid the taxes on the three theatres. Paramount went into possession of the other four theatres upon their completion and it made the monthly payments of purchase price directly to Allied and paid the taxes on the four theatres.

[fol. 34] In the Summer of 1932, however, Paramount experienced financial difficulties and came to Allied seeking an extension of time to make the payments due on July 1, 1932 and the subsequent Summer months. The consequence was an agreement between Allied and Paramount to the effect that the instalments to become due on the four theatres of which Paramount had possession, to wit: Brooklyn Paramount Theatre, Birmingham Paramount Theatre, Glens Falls and Fremont Theatres, due in July, August and September, 1932, respectively, should be paid in eight equal subsequent instalments beginning October 1, 1932 and monthly thereafter, and as consideration therefor, Paramount assigned to Allied all its rights under the assumption agreement made by Loew's Theatre and Realty Corporation, the guaranty of Loew's, Inc., and Paramount's rights as lessor in the lease which it had made to Brooklyn Manhattan Transit Company covering the office space in the Paramount Building.

Thereafter, and on the first day of January, 1933, Paramount defaulted in payment of the monthly instalments due on the four theatres. It failed to pay on account of the instalments of the purchase price which had become due on July, August and September 1, 1932 and payment of which

had been extended, the sum of $78,646.50 on the Brooklyn Paramount instalments, and the sum of $24,311.34 on the Birmingham Paramount instalments, making a total of $102,957.84. Paramount's default on January 1, 1933 was followed by the appointment of equity receivers for it by one of the Judges of the United States District Court for the Southern District of New York, on January 26, 1933, and on March 14, 1933, a voluntary petition in bankruptcy was filed by Paramount in that Court. It was [fol. 35] thereupon adjudicated a bankrupt and Charles D. Hilles, Charles E. Richardson and Eugene W. Leake were appointed Trustees in bankruptcy thereof.

Paramount failed to pay any taxes which accrued against the Birmingham Paramount, Brooklyn Paramount, Fremont and Glens Falls parcels subsequent to January, 1933.

There were some negotiations between the Trustees in bankruptcy and the attorney for the bankrupt before our appointment, in consequence of which Paramount, through subsidiaries, continued the operation of these four theatres for a period, under an arrangement which required them to account to Allied for the receipts.

Loew's continued their payments on the three theatres after Paramount defaulted in making payments on the remaining four theatres, but when the New York City taxes came due in May, 1933, it failed to pay them and then, when the June, 1933 instalment came due on their three theatres, they defaulted, with the statement and avowed intention of repudiating their contracts upon the claim that with Paramount in default, Allied would be unable to meet its obligations under the mortgages, which constituted liens on the properties under contract to Loew's; that in consequence, foreclosures of these mortgages were bound to result, Allied would lose its title to the property and would be unable to convey the property to Loew's at the end of the period though Loew's had made its payments in full, and therefore it was inequitable to expect Loew's to continue to make payments. In consequence of the default of Loew's Allied defaulted in the payment of the interest due on its first and second mortgage bonds on July 1, 1933 and the thirty-day period of grace allowed by the Indenture [fol. 36] having expired, and Loew's having made no payments on July or August 1st, Allied filed a voluntary petition in bankruptcy in this Court.

This, generally, was the situation we found confronting us as Trustees, at the time of an appointment, with the added fact that the Manufacturers Trust Company, as Trustee, was emphasizing the validity of the position taken by Loew's, by pressing for a foreclosure of the first mortgage, in consequence of the default in payment of interest thereby attempting to divest title of the bankrupt.

Roughly, we found this to be the financial situation of the bankrupt:

Assets that we could count upon as at all certain:

Cash on hand	$340,762.23
Notes Receivable:	
John Ringling-Barnum & Bailey Combined Shows and Circus City Zoological Gardens, Inc. (face value)	828,131.77
Claims against employees) Savings Fund Certificates) Miscellaneous)	Value open

Disputed Assets:

Claim against Paramount Publix in *in* Bankruptcy) Claim against Loew's in suit, Secured by seven theatre equities)	$23,000,000.00—more or less

Liabilities:

Outstanding First Mortgage Bonds, net	9,027,000.00
Unpaid interest due July 1, 1933	27,038.25
[fol. 37] Second Mortgage Debentures outstanding	1,750,000.00
Interest due July 1, 1933	525,000.00
Third Mortgage—held by New York Inv.	490,455.45
Unpaid Interest	9,809.11
Mortgages on Fremont and Glens Falls and accrued interest	288,000.00

Liabilities—Continued:		
Claim by the Federal Government for taxes	502,000.00	
Notes held by Thompson-Starrett, with interest	370,888.35	
Miscellaneous franchise and real estate taxes, including 1933 taxes on Fremont, Glens Falls, Brooklyn Paramount and Birmingham Paramount.		
Total		$14,190,191.16

Our counsel advised us that the difficulty with the situation lay in the fact that it was impossible to maintain the claims against Loew's and Paramount for the purchase prices without tendering the title to the properties, and that foreclosure of the mortgage by the Manufacturers Trust Company, would divest the Estate of title to the properties and make good Loew's defenses and enable Paramount likewise to repudiate the Allied claim. Loew's had strengthened its defenses by this time by claiming that the filing of the petition in bankruptcy constituted an anticipatory breach of the executory contract with Allied and had likewise made claim that there certain agreements between Loew's and Paramount at the time of the assumption of the obligation by Loew's Theatre and Realty Cor- [fol. 38] poration, which were consideration for such assumption; that Paramount had breached its agreements and that consequently, Loew's Theatre and Realty Corporation was relieved from its assumption agreement and Loew's, Inc., was relieved of its guaranty. Counsel for Loew's also claimed that the Loew's assumption agreement was not assignable. The Paramount Trustees had appeared and attempted to repudiate their obligations, claiming that their obligations were those of a lessee and that claims for rent on leases did not constitute provable claims against a bankrupt estate. It is to be remembered that this was the Summer and Fall of 1933, preceding the adoption of Section 77b of the Bankruptcy Act, and likewise, before the amendments of June, 1934, to Section 63a of the Bankruptcy Act.

This lease contention was the subject of considerable anxiety on our part and investigation and study on the part of our counsel. The original agreement of January 27, 1927 was undoubtedly a purchase agreement on the part of Paramount; it was however, at least to some extent, tentative and it might have been claimed that it contemplated subsequent and definitive agreements. These, on such contentions, would obviously be the subsequent leases which were individual as to each property. On the other hand, the amendment of June 8, 1927, of the January 27, 1927 agreement, was executed simultaneously with the June 8, 1927 leases and expressly repudiated any suggestion that the leases superseded the January 27, 1927 agreement. This, of course, is but the slightest indication of the pros and cons of the question.

The situation was emphasized by receipt of notice from Realty Associates, Inc., advising us that there had been defaults in the payment of interest on the first and second [fol. 39] mortgages covering the Glens Falls and Fremont properties and also in the payment of taxes, in consequence of which demands were made for the surrender of possession of said premises and for consequent relief.

During this period, in compliance with Section 47, Subdivision C of the Bankruptcy Act, we arranged with counsel to file the necessary certified copies of the order of adjudication in the offices of the Register of Kings County, the Clerks of Queens County, Warren County (New York) Sandusky County (Ohio) and Jefferson County(Alabama), the various counties in which the parcels of real property of the bankrupt were located.

With counsel we initiated an investigation of the affiliations of Allied, the parent corporation, New York Investors, Inc., and its various affiliates, The Prudence Company, Prudence-Bonds Corporation, Realty Associates, Inc., Realty Associates Securities Corporation, Realty Associates Management, Inc., and 331 Madison Avenue, Inc., and ascertained the officers and directors thereof from time to time, the capitalization of the companies, their outstanding stock, the relationship of one to the other, the relationship of all to the Reconstruction Finance Corporation, the situation as a result of which the bankrupt issued and the Reconstruction Finance Corporation obtained the two notes, one of $1,000,000 and one of $200,000, made by Allied to

Prudence Company and New York Investors, respectively. With counsel we tabulated this information and examined the minutes of each meeting in the Allied Minute Book and analyzed all the corporate proceedings it had had from the time of its organization, and also tabulated and studied this information.

[fol. 40] Counsel advised us of the urgent necessity of filing a proof of claim against Paramount. A proof of claim had previously been filed by the bankrupt on the basis of a damage claim and, with advice of counsel, we determined that before the six months' period from the date of the Paramount adjudication expired, it was important that the Allied Trustees should file an amended claim. This presented the question of whether our claim should proceed on the basis of a claim for damages for breach of contract or whether we should claim as for specific performance for the purchase price. The theory upon which we should draw this claim was tied in with the question of what we should do concerning the subsequent months' instalments of the purchase price due from Loew's, whether we should seek to recover on the basis of a damage action, or seek to enforce the agreement specifically by suing for monthly instalments of the purchase price. While there was no acceleration clause in the underlying agreements, there was no doubt that the Estate would fair better if we were permitted to pursue our remedies as vendor, tendering title, than if we claimed damages based upon a simple breach. But if we were to lose the title to the property, then if we elected to pursue specific performance, we might lose our right to prosecute that claim. Counsel advised that the question of foreclosure was the crucial one and that we must resist the efforts of the Manufacturers Trust Company to foreclose at all hazards. Accordingly, we attempted to avoid an adjudication of the application made by the Manufacturers Trust Company for leave to foreclose by offering to voluntarily segregate the funds arising from the properties. The first motion was marked off but was immediately followed by another and negotiations [fol. 41] having proved fruitless, we had our counsel prepare and we submitted to the Court answering papers in which we offered to segregate the funds, pointed out the lack of necessity for the appointment of a Receiver at this time and asked that the motion be granted to which we consented to that extent.

Prior to our appointment first and second mortgage committees had been organized, a First Mortgage Committee consisting of five members at the instance of Halsey, Stuart and Company which had originally underwritten the first mortgage bonds. The Second Mortgage Committee was represented by Messrs. Chadbourne, Hunt, Jaeckel and Brown as counsel. The First Mortgage Committee was represented by Sullivan and Cromwell as counsel.

During this time, we were also in touch with the representatives of the Reconstruction Finance Corporation in an attempt to keep them informed of the status of the situation and in an effort to enlist their support in resisting the attempts of the Manufacturers Trust Company to divest us of title to the properties. The disadvantage of foreclosure from the standpoint of the unsecured creditors lay not only in the fact that we would lose practically all the assets of the Estate, but the condition of the motion picture business was at the bottom and the very nadir of the depres-ion period in the real estate market had been reached, with the consequence that a sale at foreclosure was bound to produce a very large deficiency upon which judgment could be avoided, we were informed by counsel, only by recourse to the new amendments to the Civil Practice Act, (Section 1077, et seq.) which were so novel, untried and so doubtful as to their constitutionality, at this time as [fol. 42] to offer no security in their use. We were in touch with the attorneys for the bondholders' committees and with the committee members themselves and sought by negotiation and persuasion to avoid foreclosure. In this effort and in an effort to dissuade the Manufacturers Trust Company, we went into the question with them of the result of foreclosure sale to the various classes of creditors as a result of liquidation of the Estate and demonstrated that the general creditors would be practically wiped out while the secured creditors would get buildings which would be comparatively valueless since the result of the deprivation of the Estate of the fee would merely be to enable Paramount and Loew's to take advantage of the situation and avoid their obligations under the contract since they did claim and might well claim that their obligations ran to Allied and not to the Trustees under the Indenture. The Manufacturers Trust Company's claim to the contrary was based on *on* the assignment of the lease to it, but it did

not have an assignment of the underlying agreement of January 27, 1927, which in fact, constituted the purchase agreement, nor of the amendment thereto of June 8, 1927, which expressly, at the time of the execution of the leases, kept the agreement of January 27, 1927 alive and independent of such leases.

At this juncture, the Realty Associates also made a motion for leave to foreclose on the Glens Falls and Fremont Theatres, and for the segregation of the rents and kindred relief. Though the loss of the equities in these properties was not such a serious matter, counsel advised that the granting of this motion might furnish a precedent of which the Manufacturers Trust Company might avail itself and in consequence, we determined to also strenuously resist this motion.

[fol. 43] We discussed with Judge Kelby the matter of getting possession of the securities of the bankrupt corporation which were in possession of the New York Investors. We arranged to collect the interest on the Ringling Brothers-Barnum & Bailey note. We discussed the possibility of obtaining from the First Mortgage Bondholders Committee auditors' reports which had been drawn at their instance respecting the affairs of the bankrupt so as to save the Estate part of the cost of engaging accountants to do the same work. We discussed the possibility of arranging that employees who were indebted to the company should be examined informally so that the Trustees might determine the advisability of taking action against them or of making an adjustment and compromise of the claims against them on the basis of their ability to pay. We discussed the necessity of keeping constant watch on all the proceedings taken in the Paramount bankruptcy and for reports to the Trustees of all proceedings therein, so that our claim which ultimately proved to be the largest single claim, should be protected.

We arranged for submission to the Court of petitions and orders for continuation of business and considered the initiation of examinations under 21a and the examination of witnesses thereat. At this time we discussed the necessity of checking the accounts of the various theatres with which we had accounting arrangements and we discussed at very considerable length the conflicting claims of Paramount and Allied with respect to the equipment

in the various theatres. This had various ramifications. Not only did it affect the claims against Paramount and Loew's, and our subsequent controversy with Paramount-Ohio, but it affected administration of the Estate with [fol. 44] respect to insurance and among other things, repair and custody of the chattels included therein. On this score, as has been pointed out, under the original agreement, Paramount was to contribute up to 15% of cost for the furnishing of the equipment of and in the various theatres. It was our contention that not only did permanent equipment once placed in the structure, become part thereof, but that title in all equipment vested in Allied by express terms of the agreements, and that Paramount could acquire title thereto only by compliance with its contract. Paramount, on the other hand, by reason of its contribution towards payment, claimed to be the owner thereof. The question became crucial respecting the Fremont equipment. That theatre had been operated by a subsidiary of Paramount which had gone into bankruptcy and the Trustee in bankruptcy of the subsidiary claimed that the subsidiary had paid for the furnishings at the instance of the parent corporation and that its creditors were therefore entitled thereto regardless of the contract between its parent corporation and Allied. Its Trustee in Bankruptcy claimed in addition, that under the contract, even if the parent had paid for them, they would not have belonged to Allied. This controversy with respect to this equipment and that in the other theatres succeeded in remaining alive throughout the administration of the Estate and cropped up constantly and throughout has been the subject of numerous conferences.

We also discussed the question of the drawing of the necessary papers to compel the filing of tax claims by the State and Federal Governments. It appeared that the Federal Government had a tax claim of over half a million dollars based on consolidated returns filed by Allied and [fol. 45] affiliated companies in prior years. The additional tax claim by the Government was really all against earnings of the other companies, but the claim under the law was made against all the companies which had joined in the consolidated return including Allied. This situation also required attention from time to time throughout the administration of the Estate. The Plan of Reorganization

now under consideration contemplates a settlement of this claim upon an equitable basis.

The operation of the Brooklyn Paramount building presented varying and constant problems throughout our administration of the Estate. At this time we found that the New York Supply and Inspection Company had been supplying electricity under a submetering arrangement; that there had been a contract dated April 24, 1928 with Paramount under which New York Supply and Inspection Company had been making an intermediate profit. After consultation with and advice of counsel we cancelled this contract and temporarily made a month to month arrangement with the Submetering Company for all the current supplied in the building, and we arranged in turn, to bill the Extension Theatre Corporation.

We arranged for the pay-rolls for the operation of the building to be sent to us each week and throughout the period of administration we checked and approved the pay-rolls and drew the necessary checks therefor.

We discussed again the retention of an accountant to check the weekly accounts of Extension Theatres Corporation as well as those of Birmal, Inc., and the books showing receipts and disbursements of the Glens Falls and Fremont [fol. 46] Theatres. The latter three were not so pressing and accounting periods could be extended since we had a fixed minimum, but the former gave us some concern since we were wholly dependent on net receipts. We also discussed among us and with counsel the matter of obtaining an accounting from Mr. Shea respecting the $15,000 initially invested in and advanced to Extension Theatres Corporation for the opening of the theatre and its early operations. We had understood that the loan portion was to be repaid out of receipts as fast as possible. We also went into the question of payments being made by employees upon their loans, the agreement under which they claimed the right to pay the reduced interest rates and to defer payment of principal which was said to have been made the preceding November.

The interest on the Barnum & Bailey note was in default. The circus was being operated by interests representative of the voting Trustees whom we found committed to protect our note and promote the interests of the circus corporations rather than the individual interests of John

Ringling. We considered with counsel the question of whether we should declare a default of the principal of the note for non-payment of interest. It was pointed out that we would thereby jeopardize the credit of the circus. We had of course, the added privilege of looking to the collateral though we jeopardized the business of the circus by declaring a default, or being lenient with respect to the interest, declaring no default and giving the circus corporations an opportunity to rehabilitate the venture by the use of the moneys which otherwise they would be compelled to pay for interest. In this connection it was disclosed that the circus had on hand sufficient moneys to pay the interest [fol. 47] on the note, but that if that money was used for the purpose, and we were assured that it would be if we insisted on it—that we would not be permitted to declare a default of principal for non-payment of interest—the circus would have difficulty in continuing to finance its operations without going out and borrowing additional moneys. The matter was a serious one for if the mortgages were to be foreclosed the Ringling note was the only substantial and tangible asset to which the unsecured creditors could look, outside of the cash on hand, which itself was comparatively insignificant in the light of the liabilities. The questions involved matters of our legal rights and responsibility and were intermingled with questions of policy and of business judgment. We were asked to determine our right to prevent the circus corporations from borrowing moneys for current expenditures as well as our right to defer demand for payment of interest, to declare default and these questions, among others, required investigation into the whole legal, business and financial situation over a period. We discussed the question of whether we should attempt to declare a default even though we took no action thereon and later excuse it if the situation so warranted. In connection with this phase of the situation, as well as respecting other matters, with and through counsel, we made an exhaustive investigation not only with respect to the instruments, which had been executed and delivered, but by examining the various witnesses to the transactions. These investigations ran over a considerable period and there will be found references thereto hereafter. For the moment, suffice it to say that we found that on September 26, 1929, John Ringling had borrowed from the [fol. 48] Central Hanover Bank and Trust Company the

sum of $1,700,000 on his note which the New York Investors had endorsed; that on September 17, 1929, New York Investors had formed a syndicate (to which reference was heretofore made) with itself as syndicate manager, and as a member of the syndicate, and that syndicate members, other than New York Investors, took approximately 25% in participations in the venture and New York Investors took the balance 74.11% plus. On August 14, 1930, Allied bought the note from the Central Hanover Bank and Trust Company. On July 14, 1932, New York Investors got a considerable amount of collateral from John Ringling in consideration of extension of time for the payment of the unpaid balance of the debt. New York Investors also surrendered a half interest in the American Circus Corporation and in lieu thereof received as Syndicate Managers a one-tenth interest in the new corporation which was formed about that time by the former owners and partners in Barnum & Bailey and Ringling Brothers. The control of the new corporation was vested in five Voting Trustees, of whom Messrs. Greve and Pender were two, and at the time we took possession, it was obvious that the Voting Trustees were endeavoring in good faith to rehabilitate the circus and pay its debts. The difficulty which the circus had experienced theretofore seemed to be largely due to mismanagement.

The consequential situation was that Mr. Ringling found himself involved with a great many personal obligations he was unable to meet, the circus business had fallen off due to the depressed financial, agricultural and business conditions in the country; there was no longer money avail- [fol. 49] able for Mr. Ringling's individual needs to be taken from the circus business; the transactions theretofore had had resulted in embarrassing it financially; the Voting Trustees and their representatives on the Board of Directors of the circus corporation had curtailed Mr. Ringling's powers and drawings in an effort to put the financial affairs in proper shape; in the course of these operations they had necessarily antagonized Mr. Ringling but had obtained the cooperation of other stockholders, the members of the Ringling family, and were undertaking to repair the financial ravages. We not only went into the business situation of the circus but also the manner in which it did business. We found that the cash on hand was insufficient to enable it to carry over the Winter and resume operations in the

Spring even though it did not pay our interest. We found that a very considerable sum of money was needed for the purpose of feeding the animals throughout the Winter and transporting the circus to Winter quarters and to keep in Winter quarters, the skeleton organization necessary for the care of the circus and its properties and to repair and rehabilitate its fixtures, furnishings and materials in preparation so that it might resume operations in the Spring. We came to the conclusion that it was our duty to protect the circus and to keep it in business; that it constituted part of the collateral for our loan; that it would not do to merely look to the other collateral and let the circus go. Particularly was this so since New York Investors, one of our guarantors, was in equity receivership and John Ringling, the other, in bad financial shape. Though conditions were bad throughout the country, we found on investigation that in practically every single year the circus had [fol. 50] made money; some years as much as a million dollars, and that even with conditions as bad as they were, it managed to break better than even.

We had counsel investigate the status of the collateral and found there was a mortgage on the vacant land at Alpine, New Jersey, of $140,000, for which a cash offer of $90,000 was said to have been received, and there were also some $400,000 par value of Atchison, Topeka and Santa Fe 4% Bonds due in 1995 which were pledged with the Interstate Commerce Commission in connection with the Excessive Earnings Recapture Law, the equity in which had been repledged with New York Investors as part of our collateral. It was said that by reason of the repeal of the Excessive Earnings Recapture Law these bonds could be reclaimed from the Interstate Commerce Commission pledge and $325,000 in cash realized on them. Mr. Ringling also had an art collection which he had transferred to the Rembrandt Corporation and the stock of this corporation was pledged as collateral. Unfortunately, however, the Town of Sarasota, where the art collection was located and in which it had been exhibited in a museum, had exempted the museum from taxation on the theory that the venture was a public and charitable one, but about this time or a little later, claiming that admission had been charged by the museum, it filed a rather large tax lien against the art collection. There were also rumors and charges that part of the collection, said to be the most valu-

able pictures, had been improperly removed and diverted from the Rembrandt Corporation. The uncertainty about the collateral, the fact of the Manufacturers Trust Company participation therein, convinced us of the necessity of looking to the circus as part of our security. We de- [fol. 51] termined to give the management of the circus cooperation in their efforts to continue it in order that it might, from the funds on hand, the collateral and moneys which might be borrowed, carry itself for the Winter and be in shape to take advantage of better conditions the following Spring.

It might be said parenthetically, that this dgment proved to be wise; that not only has the circus since paid on its note all interest to date, but that as soon as its needs are estimated for the ensuing Winter of 1934 and the early Spring of 1935 its profits this past year have been such that under the provisions of the note there may be a payment on account of principal. In the same aside, it may be mentioned, too, that we had had talk of offers for the purchase of the note that have approached the par value thereof and we are confident that ultimately the full value of the note and all interest will be realized. We determined that though it might be optional with us to declare a default of principal for nonpayment of interest, of failure to collect interest from the circus corporation while it had moneys available to pay, was the equivalent of a loan and without our power and that the interest would therefore have to be paid; that the circus would have to be financed by other loans and the questions of our status in consenting thereto would have to be matter for future consideration. We collected the interest amounting to $33,705.84 to May 26th, 1933 and we paid over to New York Investors, as syndicate managers $8,723.86.

Upon advice of our counsel, we determined to have a proof of claim printed for the assistance of creditors in filing their claims secured and unsecured. Our counsel investigated the question and reported to us that there was doubt at the time about the right of a Trustee to file for [fol. 52] bondholders. There have been decisions on this since, but at that time, the question was not at all settled. We discussed the question of whether in view of the uncertainty, the Court would not be justified in making an order allowing the Trustees to advertise beyond the usual formal

notice to present claims so that creditors might have every possible opportunity to file within the six months' period—particularly in view of the still prevailing impression that the twelve months' provision was still in force in bankruptcy—and might not be precluded by failure to file if the blanket filing by the Trustee was ultimately held ineffectual.

The filing of a claim against Paramount and the theory upon which it should be filed was the subject of much earnest consideration on the part of your petitioners and their counsel. The respective basis of damages and full performance were investigated by counsel and their report thereon was considered. We found that the necessity of keeping title good and the imminence of foreclosure were the keystones of approach. The question of being bound by election of one theory or another could not be dismissed. The disclaimer by Paramount Trustees, their previous disaffirmances, their future attitude, the theory upon which damages could be claimed, present value of the money payments to be made in the future, the present and future value of the real estate as a deduction, the computable date of the damages and the offsets; the lease or purchase agreement constructions; the right to amend in bankruptcy after the time to file claim has expired; all these were considered as legal and business questions in an effort to protect the Estate's claims and not jeopardize its chances or the extent [fol. 53] of its recoveries. The complications which might be engendered by statements or assertions in this claim; the necessity of accord with the claims theretofore made by Mr. Davison in the Paramount and Loew proceedings; the necessity of conformity with our future prosecution of the Loew claim and our defenses against the foreclosure efforts of the Trustee under the First Mortgage Indenture, made the drawing of this claim a matter which required mature consideration and proper exercise and judgment. The proof of claim was drawn and filed by counsel with our constant cooperation for the full purchase price on the theory that we were going to resist and defeat the Manufacturers Trust Company's efforts to foreclose and that we would be successful in so doing on a presentation of the facts to the Court, and also on the theory that, at least with this claim, (as we were advised by counsel) we could

always amend to claim damages even after the bankruptcy limitation of time to file claims.

We discussed with the First Mortgage Bondholders Committee and their counsel, the matter of getting the various accountants' reports to which reference had previously been made. We were anxious to see all these before making any arrangement respecting payment of part of their cost so that we could determine to what extent they would be useful and the necessity of our retaining our own accountants.

Our counsel had negotiations with Mr. Beach of Alabama and reported to us with respect to reduction of taxes on the Birmingham Theatre. Mr. Beach had been retained by the bankrupt to effect a reduction for the previous year and he had a bill of $594 therefor. We wanted to be able [fol. 54] to avail ourselves of the services of Mr. Beach for the subsequent year, but found it impossible to pay his bill for the previous year in full since it constituted a mere general claim against the Estate and we therefore asked him to file a general claim for the amount.

We arranged for the preparation of our First Report which, under the Statute, was required to be filed within thirty days and was exclusive of the exemption report which had already been filed. This was based upon the inventory we had taken as required by the General Order and to which detailed reference has heretofore been made.

We realized that our attitude with respect to Paramount and pressing our claims against them must be tempered by the fact that we were depending upon our use of Paramount pictures in the various theatres in the operation of which we were concerned. Our investigation respecting the motion picture business indicated that the use of the franchise for motion pictures constituted a frequent and most potent weapon in controversies in this industry; that the supply of pictures was limited; their use a privilege and a deprivation thereof the means of destroying the financial responsibility of a corporation owning or operating motion picture theatres. In our particular situation we found that the downtown Brooklyn field was overcrowded with large houses; that under existing conditions it was practically impossible to keep them all filled; that not only were first run feature pictures an essential, but their drawing power

determined the line between profit and loss; that several large competing companies had a second call on the Paramount franchise we were depending upon in Brooklyn for operation of Brooklyn Paramount and that there had been [fol. 55] overtures and negotiations designed to deprive us of pictures. This delicate field was left to Mr. Greve whose familiarity with the motion picture industry and its subterranean complicated structure enabled us to keep pressing our Paramount and Loew claims to the full without jeopardizing the continued operation of our theatres. This, however, was not a matter of momentary negotiation but involved constant vigil and unrelenting effort and negotiation throughout the entire period of administration.

At this time we discussed with the First Mortgage Bondholders Committee the matter of our possible claims against Paramount for operating profits on the theatres during the period of the Paramount bankruptcy and equity proceedings. The accountants' reports for which we were negotiating, touched upon the figures resulting from these operations.

We had our attorneys go into the Paramount bankruptcy proceedings and examine into the proceedings therein had and the various stipulations and orders on file to see if we could not ascertain just what subsidiaries had operated the various theatres and what their operating profits might have been. The situation, of course, was complicated by the large number of Paramount subsidiaries, with the intercompany charges and the difficulty of segregating the complicated inter-dependent operation of the many Paramount companies. We initiated this investigation at this point and pursued it throughout the period of our administration. It will be referred to hereafter.

Counsel received notice of personal injuries to one, Teresa Blackwood at the Brooklyn Paramount Theatre; we, with counsel, investigated the situation, the necessary [fol. 56] action thereon to protect the Estate from liability was initiated.

We arranged to get periodic statements of income and expense of Brooklyn Paramount so that the same might be checked. Instead of hiring accountants to make these audits, we arranged for Mr. Buckbee to do so. We made definite the authority of Realty Associates Management, Inc., to issue orders and make ordinary and usual contracts

for supplies, materials and labor for the operation of the building in our account pursuant to the authority we obtained from the Court.

We had a controversy at this time with the Brooklyn Edison Company on an unpaid bill for current, as well as a claim by Paramount for moneys received from tenants under the submetering arrangement. The Brooklyn Edison Company required a deposit of $1,400 to cover the office building current and $6,600 to cover the theatre portion. We arranged to get the latter sum from Extension Theatres Corporation, that it should remain its money and be deposited with the Brooklyn Edison Company and we arranged to deposit $1,400 for our account respecting the office building.

We were notified of building violations against the Glens Falls Theatre and took the necessary action thereon. We likewise were notified of a fire prevention violation on Brooklyn Paramount concerning which we authorize- the necessary action.

About this time we started with counsel, a series of conferences with the First Mortgage Bondholders Committee and Second Mortgage Bondholders Committee and their respective counsel designed to enlist their cooperation in our effort to avoid foreclosure. By now we had gone into the factual situations rather thoroughly and counsel had [fol. 57] considered and informed us with respect to the legal questions involved. In our first interviews with the Committees, for which Mr. Greve arranged, and all of which he attended, the First Mortgage Committee had taken the position that there was nothing to discuss, that the bondholders had a first lien on the property, that the position of the junior and unsecured creditors was unfortunate, that the First Mortgage Bondholders had a right to foreclose and to obtain a deficiency judgment and participate with the junior creditors in the approximate $1,000,000 of assets that would remain in the Estate, and that the First Mortgage Bondholders by virtue of the foreclosure would become the owners for their own benefit and that they would undertake to pursue the rights of the Estate against Loew's and Paramount. The position of the representatives of the First Mortgage Bondholders was simple: they would enforce their legal rights regardless of their sympathy for the junior and unsecured creditors whose

fate it would be to be wiped out in the process. We, on the other hand, had, with our counsel, gone into and were going into various questions of law respecting our claims against Paramount and Loews, such as, our rights for the purchase price or for damages, the necessity of keeping the title in each event, the right to seek money judgments and take recourse to properties, title to which was held by us as security for the vendor's lien, the state of the law respecting enforcement of our vendor's lien in the face of the varied and somewhat conflicting provisions of the various agreements, the right to sue for single instalments of purchase price as they accrue, the right of acceleration, the right to claim for a single breach, the lack of our title as a defense, [fol. 58] by Loews and Paramount, what constituted our being disabled from performance, the effect of deprivation of title by foreclosure subsequent to Paramount's and Loew's defaults, the effect of foreclosure on Paramount's previous disaffirmance of the leases; our right to maintain dispossess proceedings under the leases for non-payment; the effect thereof on the survival of our claims and the vendees' obligations; whether Loew's had attorned to Allied as tenants and the effect thereof; the application of the third party beneficiary doctrine; our ability to enforce our claims without title to the leases which were unquestionably pledged; whether and to what extent Allied rights in such event were defined by the purchase agreement or the leases, and to what extent by both; the effect of the blanket mortgage as between Paramount and Loew's; the effect of the release clauses and the possibility of treating the obligations as separable; whether separability was effected by the assumption agreement between Loew's and Paramount; the effect of Loew's remaining in possession as a waiver of their defenses; what other acts of Loew's might be so construed; the effect of the claim of eviction by paramount title; the extent to which Loews' contributed to the default and the legal effect thereof; the necessity of tender of title before obligation to make final payment would arise and whether such necessity existed respecting prior payments; the effect of election as between claim for damages and claim for purchase price; must Allied have performed to date of breach by Loew's and Paramount or to date of commencement of action to recover monthly instalments or to date of election to claim damages; right of

acceleration under the clauses in the lease and purchase [fol. 59] agreements; right to recover as penalty or as liquidated damages; the extent of the pledge under the trust mortgages; the effect of the pledge of the leases without pledge of the purchase agreement; was guaranty agreement a guaranty of payment or of collection; if we have claim for damages, did that accrue to Trustees under Indenture by assignment of the collateral security and the leases; the effect of assignment of rents on default; the respective rights of the Trustees in bankruptcy and the Trustee under the Indenture; the rights of the United States Court to hold jurisdiction as against an action of foreclosure in the State Court; ability to foreclose in the State Court where one of the parcels was in another State; separability of the Indenture as to foreclosure; priority of jurisdiction between the Federal and State Courts, etc.; the right of the Bankruptcy Court to forbid foreclosure, to hold jurisdiction, etc. All of these problems counsel briefed for us thoroughly.

We appreciated the gravity of the situation and that the improper exercise of our judgment, though wholly within the law, might result in devastation of the Estate. On the other hand, were we impelled solely by motives of self protection, we would avoid responsibility for acts of judgment, regardless of the ultimate effect. Our counsel went into the questions of law, abstract and without precedent though some of them might be, in an effort to find a way that would make appeal to the bondholders, or lacking persuasion, compel their cooperation in our efforts to salvage the equities for the junior creditors.

We found that the Manufacturers Trust Company had also filed a claim in the Paramount Bankruptcy, in which it contended that under our Indenture of Mortgage it, the [fol. 60] Manufacturers Trust Company as Trustee, was the owner of the claims we were asserting against Paramount. We came to the conclusion that at this point we could look to the senior creditors and their representatives for little sympathy; that unless we could offer a fortified resistance to the demands of the secured creditors, the ensuing situation and the conflicting claims made by them could only serve to enhance the opportunities being afforded Paramount and Loew's to avoid their obligations under the agreements. We therefore determined to approach the

situation from an aggressive standpoint. First, counsel had discovered and we now made clear to the First Mortgage Committee that it was our contention that the agreement of January 27, 1927, the Loew Theatre and Realty Company assumption agreement, which had been acquired by Allied from Paramount was not pledged since the guaranty agreement of Loew's, Inc., had not been pledged under the First Mortgage Indenture. We made it clear that we were prepared to maintain through the Courts our position that only the Trustees in bankruptcy could enforce the claims as against Loew's since they alone were the owners of the Loew assumption agreements and Loew guaranty. We likewise made it clear that the very favorable Brooklyn Manhattan Transit Company and Brooklyn Queens Transit Company leases, under which the tenants were obligated to pay $150,000 per annum, and the first of which carried a total rent obligation of approximately $1,800,000 and without which the value of the Brooklyn Paramount Office Building would be materially lessened was also the unpledged property of the unsecured creditors and that in consequence a foreclosure could result only in [fol. 61] the sale and acquisition of the naked fee, and that we would, on behalf and for the benefit of the unsecured creditors, whom we represented, undertake to liquidate these unpledged assets by sale to the Loew interests of the guaranty of payment of Loew's, Inc. Investigation had disclosed and convinced us that the Loew Theatre and Realty Corporation might well claim to be financially unable to fully perform its assumption agreement and without the Loew guaranty, the assumption agreement might have little value. We likewise maintained that under the existing moratorium laws, the Courts would decree that the previous values of the properties would prevail; that analogously we would have the right to insist that previously existing equities would prevent foreclosure and that consequently, we maintained, that not only would the trustees resist any effort to foreclose and resist any efforts to obtain a deficiency judgment, but would undertake the offensive and ask the Court to sell the properties free of the liens of the mortgages.

In this connection our counsel then and later went into the questions of the condition under which the Court might decree a sale free of liens; the right to sell in bankruptcy

for other than cash; the right to take securities as a consideration; the extent to which reorganization could be had as under guise a composition. We went fully into the facts; counsel investigated the law and prepared memoranda on proposed reorganization from a basis of which we maintained our legal and factual position and argued with the secured creditors' committees and their counsel. We pointed out the damaging result of liquidation to the secured creditors; the possibility of affirmative damage claims on the part of the unsecured creditors arising from the Manufacturers Trust Company's unjustified attempts to claim [fol. 62] under the unpledged purchase agreements between Allied and Paramount and the unpledged assumption and guaranty agreements between Paramount, Loew's and Allied, with resulting damage to the unsecured creditors. We pointed out there was no after acquired clause in the Indenture of Mortgage that justified any claim of lien on the assumption and guaranty agreements and pointed out that when the first mortgagees got the theatres, if they did after long litigation, they would be subject to large amounts of unpaid taxes; that in the intermediate struggle between unsecured creditors and the first mortgagees, there would be corresponding litigation between the prior lienors and the junior lienors; we pointed out that the advantages of transactions by which Allied had been able to acquire the guaranty and the assumption agreements would be entirely negatived; we pointed out that the Paramount franchise for first run pictures now held under a stipulation that it might revert to Loew's or Warners, would cease and leave Brooklyn Paramount practically a shell; that in the ensuing litigation it was more than possible that the Brooklyn Manhattan Transit Company might find means of avoiding its lease even if it were held to belong to the secured creditors. We pointed out also that the first mortgagees, receiving the theatres under these conditions would have no expert management therefor. On the other hand, we pointed out that if title was kept good and the right to proceed against Loew's for the additional purchase price maintained and not released, the claim pressed against Paramount, with a united effort by all the Allied creditors, secured and unsecured, there should be an ultimate realization of approximately $17,500,000 to cover claims aggregating only $15,000,000, leaving not only interest for the [fol. 63] creditors, who would thereby be paid in full for

the ensuing period while awaiting payment, but a possible equity for stockholders. (This statement is being dictated from contemporaneous memoranda prepared as early as September, 1933, and from which the arguments and contentions were presented to the secured creditors to induce them to abandon the course adopted by the Manufacturers Trust Company.) We pointed out that though we were under disabilities and the legal stringencies of the Bankruptcy Act, with cooperation, we could probably use the bankruptcy machinery provided for sale free of liens, or of composition, or at the worst, of friendly mortgage foreclosure, the latter, however, only after we had been able to secure binding engagements from Loew's as a result of the concerted action against them, so that the transfer of title in foreclosure proceedings would not enable them to avoid their obligations. We pointed out (again quoting from an early memorandum) that "aside from the technical difficulties, reorganization along these lines should be feasible. Putting it abstractly, it involves cooperation, some patience, mutual forebearance, which translated, means that each class of creditors will cooperate in an effort to realize fully on all present and potential assets and forego fixed charges that may result in default pending ultimate determination of values and realization thereof."

Meanwhile, however, the Manufacturers Trust Company was pressing for its order of segregation regardless of argument and persuasion and the First Mortgage Committee remained adament in its determination to enforce the legal rights of the bondholders.

[fol. 64] About this time the Trustees started discussion on a question upon which they could not agree; the advisability of keeping the cash funds of the Estate, which then amounted to over $300,000, in bank without receiving interest of whether the cash might be invested in securities, such as Government Bonds, at 2½%. There was considerable discussion and dissention of opinion concerning this matter from time to time then and thereafter. The subject was investigated by counsel who reported that there was no rule of law or of Court found on the subject and discussion with the Clerk of the Court and the Referee in Bankruptcy indicated diversities of opinion but in any event that the matter was one for the exercise of judgment. There were discussions with the various banks but all were

bound by existing restrictions to pay no interest except on time deposits.

We had some additional violations on the Glens Falls Theatre to which we gave attention.

We had some difficulty with the Brooklyn Edison Company again about the discount on the electric current.

We arranged for an inventory with the Extension Theatres Corporation and we drew a contract respecting the electrical deposits.

We discussed with counsel the question of having appraisers appointed.

By now counsel had received the pleadings and other papers in the Loew actions and we were fairly well informed of the rudiments of the facts and the law. We had largely formulated generally what our policies should be though the ever present possibility of foreclosure made it impossible to adopt any definite course of action. We had to keep ourselves free to shift our position as expediency dictated and it was imperative that we take no position [fol. 65] and make no contentions that might hamper us in adopting a later attitude compatible with the situation. Basically, we must prevent foreclosure, first by resisting foreclosure through the Courts (we were by now firmly convinced of our inability to make any headway with the Manufacturers Trust Company by negotiation) and second, by weakening the position of the Trustee by inducing the First Mortgage Bondholders Committee to respect and go along with our efforts to work out a plan designed to compromise the rights of the senior and save the rights of the junior creditors.

After consultation with counsel, we were advised and determined that in any event we were bound to so delay any foreclosure action by the first mortgagee and so expedite hearings on our claims against Loew's, that the latter would not be able to avail itself of anything stronger than its defense of anticipatory breach and particularly that it might not, by reason of the progress of the foreclosure action, be able to claim an actual or constructive eviction and a consequent present and actual breach.

The prosecution of the claims against Loew's however, involved a determination of whether it should be a damage or a specific performance claim. Counsel informed us that maintenance of dispossess proceedings, which would

obviously expedite a determination of the Loew claims (claims for rent in any amount were determinable in the Municipal Courts in conjunction with dispossess proceedings and hearings could be had in a week) involved the same question and also might commit us to a position on the leases which might be used to our disadvantage in the Paramount controversy. Consequently, though we were anxious to press the claims against Loew's for the reasons aforesaid and also because our aggressive attitude was weaken-
[fol. 66] ing some apparent enemies who for their own purposes were glad to be able to have this delay on our part as a ground for criticism of us personally, we determined that we would take no action on the pending Loew actions or the constantly accruing claims until we had some more definite notion respecting the possibilities of foreclosure—either from the attitude the Court should take in the legal proceedings or as a result of some inroad upon the adamant attitude of the First Mortgage Bondholders Committee.

This latter offered little possibility at the time—the reactions we succeeded in getting when the Committee was not wholly sphinx-like—were unfavorable to our position and in support of that of the First Mortgage Trustee. In line with this, counsel for this Committee indicated his intention of getting in touch with Loew's directly. The Trustees opposed this, feeling that the psychological effect of having Loew's feel that there was disunion on our side would be very bad and for a time—but for a time only—succeeded in inducing the First Mortgage Bondholders Committee not to take such action.

In this connection with the aid of counsel, we drafted, just as soon as we felt we had a fair and comprehensive view of the situation, plans of composition and reorganization and constantly and from time to time thereafter changed and amended and modified the same, both as to form and substance, the machinery and method designed to be employed, all, though not ordinarily the business of Trustees, utterly essential as a condition of the litigation and later compromises with Loew's, Paramount and Realty Associates and of the utmost important in avoiding a complete disintegration of the possibilities of realizing upon
[fol. 67] the assets for the junior and unsecured creditors.

The Referee had said that he liked the First Report of

the Trustees and suggested that it be mimeographed, but the Trustees saw no necessity of doing so.

It was determined to authorize the payment of $570 for the audits that the First Mortgage Bondholders Committee had turned over to the Trustees.

It was determined that taking detailed inventories might be deferred until the appointment of appraisers later. Mr. Buckbee was retained to do the accounting work from September 21, 1933, at $50 per month and his duties were to include checking the accounts of the various theatres obligated to account to the Trustees.

We had a question with Halsey, Stuart & Co., about the balance in their hands as paying agent which had not been turned over to the bondholders.

We gave Halsey, Stuart & Company notice that there should be no further payment of interest to bondholders. We made the claim that these moneys constituted general funds of the Estate, though there was a difference of opinion among the Trustees as to whether the setting apart of these funds constituted an irrevocable allocation or appropriation, or whether they remained general funds of the bankrupt. We determined that we would have to make an application so as to settle the question, in any event.

Some question came up again about the Extension Theatre light deposit. The Management Company wanted to be relieved of responsibility, Extension Theatres was running behind in its receipts and it was suggested that we [fol. 68] and Paramount take a reduction on our pro rata payments so as to avoid difficulty.

With counsel we examined the Mortgage Indenture with respect to the provisions concerning the paying agent on the interest allocation question.

We had all the various audits copied and distributed them and we studied them.

The question came up respecting Allied's claim against New York Investors. With counsel we went into the history of the financial transactions with the affiliated companies, particularly with respect to the possible claim against New York Investors and we found that New York Investors, Inc., by virtue of its stock ownership of Allied Owners Corporation, had largely controlled Allied Owners Corporation. We found in connection with this and also

in connection with our investigation of the Ringling situation, that New York Investors was the guarantor thereon, from the Central Hanover Bank & Trust Company. In consequence, since the time in the equity proceeding to file claims as limited, we made contingent claim against New York Investors for the amount unpaid on the Ringling note so that should by any chance any portion thereof be unpaid, we might be in a position to recover from New York Investors, such unpaid balance. It appeared, too, that at the time of the acquisition of the Ringling note, Allied borrowed the $1,700,000 required from Realty Associates on a demand note. This note required the deposit of collateral by Allied with Realty Associates and since it had no securities to pledge as collateral, Allied purchased securities from New York Investors and from the Prudence Company, in consequence of which it became indebted to New York Investors in the sum of $1,718,460,48. Then Allied borrowed from the Central Hanover the sum of [fol. 69] $3,000,000 and paid moneys to New York Investors, thus converting the Allied debit to New York Investors aforesaid, to a net credit of $1,281,539.52, which ultimately New York Investors paid to Allied.

The accountants reported that Allied had paid to New York Investors through a mutual mistake, a share of alleged income tax of Allied which amounted to $64,739.96, and that there had been an overpayment, by Allied to New York Investors through a mutual mistake, on purchases of securities by Allied from New York Investors of $176,828.22. For these items a claim was filed by us in the equity proceedings against New York Investors after these various transactions had been analyzed and studied.

Mr. Greve's appointment having been confirmed, a creditor took an appeal from the order of confirmation. The other two Trustees felt that though they had remained aloof from the controversy preceding the appointment and subsequent approval of Mr. Greve as Trustee, Judge Moskowitz's order had disposed of that controversy and that they were bound for the protection of the interests of the Estate, to take a position in the attempt to review Judge Moskowitz's order. In addition, their experience in this matter since the date of their appointment had convinced them of the necessity of having the services of Mr. Greve as a Trustee. In consequence, there was cooperation between the Trustees and counsel appearing for Mr. Greve, respecting

this matter which assisted in a denial of the motion for leave to appeal and respecting subsequent attempts to indirectly effect Mr. Greve's removal, at least so far as matters not wholly individual to Mr. Greve were therein concerned.

[fol. 70] We took up the question of bringing the accountants' reports up to date (they had stopped at June, 1933) for the protection of all concerned and we also discussed the matter of getting Paramount to agree to make an equal contribution with us towards the Extension exchequer.

The motion picture business, as we have indicated, was none too good and the local condition made the operation of Brooklyn Paramount at this time, something of a problem. Its operation involved highly technical questions, such as, for instance, whether or not we should have a stage show for competitive reasons. A stage show proved to be an expensive venture with possibilities of considerable loss, though it increased attendance and provided better competition. On the other hand, good pictures without a stage show provided receipts with a minimizing of expense. From time to time we were concerned with technical problems such as these, particularly when Extension Theatres Corporation was in need of money.

With our counsel we were preparing for examinations of books, records and witnesses in connection with our first meeting of creditors and for a supplemental 21a examination. We were going into the relations between the various subsidiaries and affiliates, their officers and directors, preparing for these examinations.

We were working on the Loew pleadings with our counsel, examining the papers for the facts and they working on the law. We were having daily meetings of two or more of us and with counsel.

We had succeeded in inducing Realty Associates to withdraw their first motion but they now started to press us again for an order of segregation and for leave to foreclose. With counsel, we looked into the question of whether [fol. 71] there was any possibility of our having a claim against Realty Associates Securities which was offering a composition and respecting which claims had to be filed, if they were to be filed.

We investigated and discussed, with counsel, the question of whether we should file applications for reduction of realty assessments.

We pointed out to Realty Associates that their attitude was making it more difficult for us to deal with the First Mortgage Committee and that we were really representing their affiliated third mortgagee on the five properties, in endeavoring to keep the First Mortgage Committee from wiping the juniors and the unsecured creditors out. We pointed out that we were in no position to give Realty Associates any better deal than we could afford to give the Manufacturers Trust Company and that that was of vital importance to all the creditors.

With counsel we were at this time engaged in an investigation concerning the relations between Realty Associates Securities Co., and Allied in an effort to find some situation that might keep Realty Associates from pressing us too heavily on the foreclosure.

During this time we were engaged in examinations, attendances and controversies at the first meeting of creditors.

John Ringling served counsel with notice that he wanted to include the Trustees in a suit which he desired to institute against New York Investors. The petition, though vague, indicated that he sought to cancel his guarantees on the note which we held and recover back the collateral, claiming fraud. We determined to resist this motion vigorously and at the outset counsel felt that we could defeat [fol. 72] it on the ground that the petition did not show facts sufficient to state a cause of action.

During this time there were hearings being had on the amount to be paid as Mr. Davison's fee. The motion respecting the same had been referred by Judge Moskowitz to Judge Garvin, as Referee.

Mr. Greve was attending to almost all the meetings of the Paramount Publix Corporation to which he was invited and of which he could get notice, and counsel was giving the Trustees notice of all formal matters they learned of. The matters thereby developed were the subject of constant discussion.

The matter of the interest on bank accounts was again the subject of discussion and it was at this time that Messrs. Greve and Jackson instructed counsel to prepare a petition for authority to invest the funds while Judge Callahan said he would prepare an affidavit to be used on the motion indicating his attitude to the contrary, born of fear that se-

curities might depreciate in value. Mr. Greve recommended time deposits on which the banks were permitted to allow some slight interest on Government Bonds.

A letter was prepared by our attorneys for Extension Theatres, respecting the electric current deposit which the Trustees found satisfactory and it was arranged that Mr. Buckbee should examine and check the accounts of the Management Company and report to the Trustees.

The motion made by the creditor for leave to appeal from Judge Moskowitz's order was denied and the motion made by John Ringling was likewise denied.

We were still having conferences about the Manufacturers Trust Company's segregation order. Counsel was [fol. 73] likewise putting our legal contentions in tangible form and we were still presenting them to the First Mortgage Bondholders Committee and their counsel in periodic and unintermittent conferences.

We learned that the Paramount people were engaged in studying the possibilities of a reorganization plan for themselves and we sought to arrange that they should put their data at our disposal in an effort to keep ourselves informed of the progress of their plans before they had gone too far.

Meanwhile, we were engaged in trying to improve our own plans so as to get a proper commitment from the First Mortgage Bondholders Committee. We were also discussing with some other persons interested in the Paramount matter, the question of the organization of a reorganization committee so that our interests might be protected with association with other large creditors.

We were still trying to dissuade the Realty Associates from pressing us. We were refusing to give them an assignment of rents. We were voluntarily segregating the rents and we were pointing out to them that we were making every effort to get the Committees representing the holders of the First and Second Mortgages to consent to a reorganization plan that would save the rights of the third mortgagee.

We went into the question of having the Brooklyn Paramount taxes reduced.

The Manufacturers Trust Company were trying to make their order of segregation retroactive and we, with counsel, were examining the Indenture and counsel was examining the law with respect to their rights.

With counsel we were working on the claims against Loew's and though we found the delay increasingly em-
[fol. 74] barassing since the Trustees had qualified on August 25th and we had brought no subsequent actions and had failed to notice the pending cases for trial, we were still awaiting the determination of the Committee, unwilling to take the responsibility of determining on a course of action without a commitment and yet seeking to use the existing situation to force a commitment.

We went into the question of the provisions of the Indenture respecting Halsey, Stuart & Co., as paying agent, and we were pressing the persons interested in Paramount to give us representation in the consideration of any reorganization plan.

Throughout this period, one or more of us attended Court constantly with our counsel on examinations, motions and conferences.

We had our attention called to the necessity of doing painting in the Brooklyn Paramount Building rather than have dissatisfaction on the part of the Brooklyn Manhattan Transit Company. In this connection, we went into the old agreement that was operative from 1928 to 1933, whereby the Brooklyn Manhattan Transit Company took care of the buildings, being allowed $30,000 a year for the purpose, and we took up with the Management Company the present condition of the building and we came to the conclusion that we had better employ a painter and a helper rather than have any possibility of trouble with the Brooklyn Manhattan Transit Company and we determined to do so.

We continued to press the Committee and about this time we were encountering a considerable interference with our efforts to conduct a 21a examination of witnesses. Our counsel made an investigation of the rules and practice of the Court, an examination of General Orders and the law
[fol. 75] generally, with respect to the right of the Trustees to conduct an examination at the first meeting the distinction between that and examinations under Section 21a; the necessity of issuing order before issuance of subpœnas and the right of the Trustee and those of other creditors to priority of examination. In consequence of this we attended at Court on a number of occasions and a considerable number of papers were prepared as a result

of which, we cleared up the situation satisfactorily, thus enabling the Trustees to attend to the proper business of the Estate in their own way and in an orderly manner.

Meanwhile, we continued working with counsel on reorganization plans in an attempt to get them in such shape as would appeal to the Committees.

We took up again the question of negotiations with Mr. Beach for a reduction of the Birmingham realty assessment and also considered such a move in New York. We were rather afraid to initiate these proceedings because we felt that the appraised values that might be made in these proceedings might be used by the mortgagee against us in its claim that it was entitled to foreclose by reason of the lack of value of the properties.

We were feeling the responsibility rather heavily of not pressing the Loew claims although we and our counsel were continuing to give the papers and counsel continued to give the law consideration so that when we should be ready to proceed there would be no doubt as to our course of and no delay in action. Counsel arranged to have the Loew's pleadings printed and were having some difficulty in obtaining them all. We discovered that the First Mortgage Committee had been in touch with the representatives of Loew's and their attorneys, which was what we had been [fol. 76] trying to avoid. We did manage to communicate with Loew's in an attempt to negative the harm that we thought this had done.

We kept pressing the Paramount situation so as to be kept informed of anything that was done.

We had difficulty again with respect to the furnishing of electricity to Extension Theatres. We finally made an adjustment with them.

We kept meeting with the Committees and their counsel and they finally called on us to give them another memorandum, detailing more definitely some of the points that we had stressed at the preceding meeting. The First Mortgage Committee was trying to be helpful in agreeing on a form of segregation order with the Manufacturers Trust Company with whom we were having many conferences in an attempt to avoid harmful adjudications and obtain delay.

A number of proceedings in the Paramount matter were under consideration and discussion.

We discussed the question of attempting to get security from Loew's pending the determination of the validity of our claims. The Referee had expressed an opinion that action should be started against Loew's and had said that the Trustees were not justified in withholding action against Loew's for the unpaid instalments. The Trustees had been publicly criticised for the delay by persons unfamiliar with the situation and the Trustees' motives. In consequence, the Trustees determined that they could no longer bear the individual responsibility of deferring these proceedings and they therefore instructed counsel to start the necessary action against Loew's to recover the monthly instalments due from August to November, inclusive, and [fol. 77] the instalments of taxes due November 1st. They instructed counsel to institute this action in the State Court upon being advised by counsel that an attachment could be obtained and that the law would keep the attachment good even though there was removal to the Federal Court by reason of the diversity of citizenship. The Trustees further instructed counsel to move for substitution of the Trustees as parties plaintiff and for substitution of counsel in the pending action in the Federal Court and that these actions be noticed for trial for December.

They also instructed counsel to institute examinations under Section 21a, of the various officers of the Loew corporations and Paramount corporations, particularly respecting transactions between Loew and Paramount which were being used by Loew's as a basis of defense, and concerning which, of course, we had no knowledge or other means of information. The Trustees requested counsel to make no disclosure of their determination to proceed to the First Mortgage Bondholders Committee for fear that that would weaken the effort to compel that Committee to come to a favorable determination.

We arranged with the accountants to bring the former audits up to date.

We also discussed the question of filing a Federal Tax return for Allied for 1933.

There was another accident and a negligence claim that required attention.

We had another building department violation in the Paramount office building and we were still having some difficulty getting the Extension Theatre Corporation to agree to the rates for electric current.

[fol. 78] We made demand on Loew's for the accrued unpaid payments and we discussed with counsel the question of what witnesses we could have for the 21a examinations.

With counsel we likewise went into the relations of the various affiliates and subsidiaries and suggested that our information be supplemented by further examinations. There were some transactions, such as one involving the declaration of $300,000 dividend to New York Investors in 1929 that was handled as a bookkeeping item.

We were concerned with possible preferences that might have been given by Allied within four months of the date of the bankruptcy. The various security transactions to which we have averted above and the participation of the officers and directors therein, the income tax situation of the affiliated companies, the payments on account of the third mortgage to New York Investors, the transactions respecting the delivery of the mortgages on Glens Falls and Fremont, all, in our opinion, required investigation and attention. At our request, counsel investigated and reported and discussed with us all of these matters.

Now that we had been forced to a conclusion in the Loew's suits, we authorized counsel to make the pleadings available to each of the mortgage Trustees, their attorneys, the attorneys for the First and Second Mortgage Bondholders Committees, the attorneys for Thompson Starrett, and others.

Counsel considered and reported to us the theory of Mr. Davison's former action, determining the forum as well as the form of the pleadings. We likewise were having discussions with our counsel on the pleadings in the previous actions, the form of reply, the question of consolidation of the various actions, the advisability of trying an action [fol. 79] for one instalment rather than the whole issue, with the thought that we could claim that the June default of Loew's precipitated the Allied default on its mortgages which occurred on July 1st (without considering the thirty day grace period); whether in equity the situation on the date of trial would prevail or whether if we tried the June action the Court would consider the question of whether Loew's default had precipitated the Allied bankruptcy, considering that question as of June 1, 1933, and whether in such event, the Loew claim would be buttressed by their contention that the bankruptcy constituted an anticipatory breach. In this connection we also discussed with our at-

torneys the doctrine of stare decisis and res adjudicata with respect to a trial of the pending actions first; the right of equitable set off in an action at law in the Federal Court; the right of trial by jury and the difference between the prevailing rules in the State Court and the Federal Court, the latter being more nearly a common law court; the effect of bankruptcy as an anticipatory breach in the light of the many lease cases to which counsel referred us, and whether they were applicable to our situation where we claimed purchase contracts and were bound to deny, with Paramount in the situation, the force of the instruments as leases, questions of the burden of proof, and particularly on whom it rested to show that the default precipitated the bankruptcy.

We were also discussing through this period, the question of reduction of assessed valuation of real properties and in that connection, studying the assessed valuations for the year 1933 and those tentatively fixed for 1934—Birmingham had not yet been fixed, nor had Glens Falls; Brooklyn Paramount had been reduced from $5,300,000 in [fol. 80] 1933 to $4,800,000 in 1934.

We came to the conclusion, with the Paramount and Loew situations as they were, we had better take no affirmative action with respect to these assessed valuations, but nevertheless, the question came up from time to time and we considered and reconsidered our responsibility in the matter.

We were concerned during this time with the Paramount status in the Brooklyn Paramount venture. There had been a loss for seven weeks and it was only when certain pictures were shown that a profit appeared. It was more or less apparent that showing the Paramount pictures alone would not result in profitable operation.

The trustees during this time, and particularly Mr. Greve were seeing a great number of people who might be helpful in consolidating forces in preparation for a Paramount negotiation for settlement and reorganization. Mr. Greve particularly was spending a great deal of time along these lines, establishing contacts and making connections.

We continued discussions with counsel from time to time on the question of examining under 21a the witnesses in Loew's and Paramount.

We were still holding off the Realty Associates and attending Paramount meetings and keeping in touch with their affairs.

Upon counsel's advice, we finally determined that our actions against Loew's would be brought in the State Court and that we would undertake to obtain attachments.

Mr. Ringling was threatening to start an action to cancel the note on the ground of usury and we went into the facts and discussed with counsel the law applicable thereto.

[fol. 81] We had a complaint from the Brooklyn Manhattan Transit Company about signs on the third and fourth floors and we undertook to have this condition cured.

We discussed with counsel the necessity of getting the consent of the Paramount Trustees to be named as co-plaintiffs in the actions which we were preparing against Loew's. This was necessary because of the terms of the previous agreement. Loew's said that they would like to make an application for the reduction of taxes and we discussed that with counsel for the First Mortgage Bondholders Committee and agreed that if it were done without prejudice to anybody's rights, we would consent and we instructed counsel to so notify Loew's.

Counsel's insistence upon examining the Paramount people prompted them to request certain information from us under threat of examination in their proceedings and we determined to press the matter as against them, giving them what information they were entitled to. Paramount asked us for the complete data as to all the receipts in the property account; the method of accounting and the allocation of the payments in our Federal returns; statement of all profit realized; analysis of the capital accounts as to cost of the operation on the borrowed money and an analysis of all the company transactions.

We were still discussing with our counsel, the form of Realty Associates segregation order.

Halsey, Stuart & Co. advised us that they had between $25,000 and $26,000 in their hands as paying agent and they refused to continue to withhold payments of interest without the protection of an order. We arranged that our counsel should make an application upon which the Trus-

[fol. 82] tees would take no particular position, so that the respective rights of the parties might be determined.

We took up with Mr. Beach the question of his claim for past services and his retainer for future services in connection with Birmingham taxes.

We arranged to open additional accounts in the Chase National Bank, Brooklyn Branch, both a regular and a rent account.

We discussed with Realty Associates differences that they insisted upon between their segregation order and form of the Manufacturers Trust Company segregation order, particularly as to their share in the expenses of administration.

We were still discussing with counsel the question of a consolidation in the Federal Court on the first Loew actions. Loew's were pleading in the second action that a prior action was pending and that required a determination as to whether the rule that a State Court action is not a prior action in the action pending in the Federal Court, finds exception when the State Court action is moved to the Federal Court. We spent a great deal of time with counsel discussing trial strategy concerning the pending actions which were to appear on the calendar being up to date. We also discussed the necessity for a bill of particulars and the various items concerning which we should have information, particularly as to those matters that rested between Loew and Paramount and of which we had no knowledge. We agreed that it was imperative that our complaint should be filed in the action for the August to November instalments and the November taxes, and fully served before December first.

We discussed the matter of examinations and testimony theretofore given by the witnesses and what prospective witnesses should be subpoenaed.

[fol. 83] We had arranged to have a summary of the testimony of the various witnesses to date in connection with the accountants' reports which we had on hand, so that we might discuss and come to a determination regarding the liability of affiliated companies' officers, directors, &c. We discussed what our attitude should be with respect to the $25,000 representing unpaid interest in the hands of Halsey, Stuart.

Our counsel had obtained orders limiting the time of the Government to file tax claims. We discussed the matter of filing of general claims in our Estate and considered the necessity of having a complete detailed examination made

of all claims filed and a report thereor so that we might discuss and determine to which claims objections should be made.

The controversy respecting the Fremont equipment was pressing since the Trustee of Publix-Ohio was threatening to summarily remove the equipment, and this, of course, would have terminated our rental agreement with Shea and ended the possibility of keeping the Realty Associates at bay.

The Trustees' second report was prepared and filed. An order for the further continuance of business was also prepared by counsel and filed.

We finally determined that we would not take any action on an application to reduce taxes. We were still discussing the form of the order of segregation.

Counsel investigated into the Ringling agreements so that we might determine just what our attitude should be with respect to New York Investors continuing to hold the collateral. We discussed this matter thoroughly.

[fol. 84] By this time we had had word from the First Mortgage Bondholders Committee that they had determined to support the Trustee under the First Mortgage Indenture in its efforts to institute and prosecute foreclosure proceedings on the five theatres. We determined to counter this move by taking the offensive, and counsel obtained an order to show cause requiring all concerned to show cause why we should not be authorized to sell the claims against Loew's Theatre & Realty Corporation and Loew's, Inc. under the Assumption and Guaranty Agreements for the benefit of the general estate, free from any claim or lien thereon under the Indentures of First and Second Mortgages. We thereupon arranged, after full discussion of the situation and report of counsel, for the drawing of a petition accordingly, and we obtained from the Referee in Bankruptcy such an order to show cause, which we caused to be served on interested parties. We made a demand on Halsey, Stuart & Co., and the First Mortgage Bondholders Committee for a list of first mortgage bondholders so that we might give them notice of the application and thus advise them of the situation and of the attitude that the First Mortgage Bondholders Committee, which represented only a minority of the bonds, had taken. We contemplated, in this connection, making our appeal to the bondholders directly.

Meanwhile we made an arrangement with W. B. Leedy & Company to represent us upon an application for the reduction of taxes covering the Birmingham Theatre for the year 1935. We considered the question of whether we had a right to attempt to reduce the Birmingham taxes in the face of the threatened foreclosure. We continued nevertheless to endeavor to work out a plan of reorganiza- [fol. 85] tion that would be satisfactory to the bondholders and particularly one that should make an appeal to them regardless of the attitude of the Committee and of the First Mortgage Trustee. We continued our efforts to obtain from the Committee and Halsey, Stuart a list of bondholders.

About this time the financial situation of the Circus was becoming crucial again and we attended a series of meetings of the Circus Trustees and directors and the stockholders thereof. The November interest had become due on the note and there was objection to paying it since the money was needed for Winter and succeeding Spring needs.

We were having further controversy with Extension Theatres Corporation on account of billing for electric current and the discount thereon, also in connection with unpaid bills for steam furnished theretofore.

We were discussing with the attorney for the Second Mortgage Bondholders Committee his proposed modifications of the reorganization plan designed to satisfy the First Mortgage Bondholders Committee and induce them to come along with a plan.

We finally came to the conclusion that, in the face of the threatened foreclosure, we should have to change our minds about applying for the Birmingham tax reduction, and we canceled the check which we had drawn for the retainer to Leedy & Company.

We insisted upon payment of the interest on the Ringling note since we had no right to make a loan of the amount; we collected it and sent the Receiver of New York Investors the share of the syndicate.

Ringling was pressing his claim for rescission and to set aside the note we held upon the theory that he was over- [fol. 86] reached in the transaction. His complaint was really directed against New York Investors, but Allied was drawn in, though it had put up the money for the note and had only received interest at ordinary rates. With counsel, we went into the question of whether the Court

would deny any relief to Ringling unless and until Allied got his money back; of course, all this assumed that Ringling had a case on the facts. We gave this matter consideration in connection with the thought that perhaps we were waiving some rights by giving New York Investors its portion of the interest now that we knew the facts, but finally, upon advice of counsel, we came to the conclusion that New York Investors was collecting its interest only in the capacity of Syndicate Manager. We did, however, conclude after consultation with counsel that we were not much concerned with Ringling's attack since we concluded that no Court of Equity would restore Ringling to his former position without restoring Allied to its, since Allied could not be even claimed to have been an active party to the alleged fraud.

With the support of the First Mortgage Bondholders Committee, Manufacturers Trust Company now served us with a notice of election to declare the principal of all the First Mortgage Bonds due for default in payment of interest and taxes so as to lay the foundation for its proposed foreclosure. We made demand on Loew's for the payment of the instalments due December 1st in preparation for our action.

We had some talks with lawyers representing Ringling in respect to his proposed suit. The matter of the municipal tax claim against the Ringling pictures became pressing, and we decided that, for the protection of the collateral, in [fol. 87] view of the existing situation, we would have to retain counsel and make sure that the pictures in the Sarasota Museum were protected from the tax claim of the municipality.

We had discussions with respect to a contract with the National District Telegraph Company for watchman service.

We had a good many conferences with Ringling and attorneys representing him, and were considering the possibility of getting the necessary instruments releasing the Santa Fe bonds and out of the money so received to allow the Circus to use an amount sufficient to carry it over the Winter. We were discussing at this time the possibility of equity receivership for the Circus corporations, the financial situation of which was most pressing.

We consulted with counsel and approved the proposal to move for a preference in the Loew actions and to oppose the motions of the other side for the transfer of the cause

to the equity calendar so as to avoid a jury trial. Our counsel had placed the actions on the jury calendar. We discussed this matter and came to the conclusion, as before, that a jury trial would be far more favorable to us.

Our motion for a bill of particulars was put in shape by counsel and brought on, and we proceeded with the action for the August to November instalments, our counsel preparing a subsequent complaint for the December instalment.

During this time the examinations under 21a were going on and we were attending and discussing the testimony of the witnesses and the facts adduced thereby, and discussing the witnesses we sought to examine.

The matter of fixing Mr. Davison's compensation was still [fol. 88] pending and receiving attention. The hearings before the Master were proceeding and we were doubtful about the advisability of retaining experts. Halsey, Stuart filed an answer setting up the necessity of holding the moneys held by them as paying agent and we discussed this matter. Counsel reported they were still negotiating with respect to the bondholders' list with Halsey, Stuart's attorneys.

The question of the form of the Manufacturers' segregation order came up again, and of the proposed amendments thereof, and Realty Associates also made a motion for segregation and that matter was still under consideration.

The Trustee of Publix-Ohio made his application to sell the equipment in that theatre free of liens, and we discussed the question of the form of our answer, contending that the installation was made pursuant to contract and that the only rights of Publix-Ohio are as a creditor of Paramount Publix. We also discussed the necessity of having examinations jurisdiction rather than in Ohio, if that was possible.

We were continuing to follow up the Paramount matter. We learned that studies were being made with a view to ultimate reorganization, and Mr. Greve was spending a great deal of time keeping in touch with people interested in that matter and familiar therewith. We were not pressing the Paramount claim, first, because we wanted to get the Loew liability fixed, and then because the longer the Paramount claim was delayed the greater the chances that Paramount would be compelled to give us a favorable settlement in order that they might reorganize their own

affairs. After consultation with counsel, we had concluded that our reorganization was not in any wise dependent upon [fol. 89] the determination with Paramount, while theirs was with us.

We were still discussing claims against affiliated and subsidiary companies, the Record was being examined and a report thereon in contemplation. There was a hearing before the State Tax Commission to determine the percentage of the mortgage tax applicable to the Glens Falls Theatre on the blanket mortgage, which had been recorded and which also covered the Fremont Ohio theatre property.

Counsel informed us that in view of the fact that the segregation order entered by the Manufacturers Trust Company was based upon an understanding that there would not be a foreclosure, and since the Committee and the Manufacturers Trust Company had since come to a different conclusion, we determined that there should be a motion to vacate the order unless there would be a consent that there should be no foreclosure, and our counsel were instructed to move accordingly. Mr. Davison now proposed to increase the amount of his fee, and the Trustees made serious objection thereto and instructed their attorneys to make active opposition.

The Circus corporation was proposing to borrow new money. We insisted that we be informed of the situation, and we asked counsel to go into the question, on a consideration of all the papers, of what our rights were to prevent the corporation from doing so as a matter of law, and the question of the exercise of business judgment was still depending on the investigation which we were engaged in making.

Our counsel came to the conclusion that Halsey, Stuart as paying agents must hold the unclaimed fund which had [fol. 90] been segregated for the purpose of paying interest, but to protect the Estate we proceeded to obtain an adjudication.

We made objection to paying the bill for liability insurance preceding the date of the bankruptcy and insisted that the Insurance Company file a claim as a general creditor.

We determined, if necessary, to retain experts on Mr. Davison's claim, if he insisted on an excessive amount, and we discussed the advisability of trying the Loew suits at

the earliest possible moment, or whether it might be better judgment to defer the trial so that we could make our preparation in conjunction with the Bondholders Committee and the Trustee under the Mortgage Indenture. In spite of their adverse attitude on the question of foreclosure, they wanted to cooperate in pressing the Loew suits and we felt that this was desirable from every standpoint and particularly to keep the opportunity for negotiation open. It was felt that it was important to try the cases before the first of the following year, so that there might not be a claim of our default in retirement of the specific percentage of bonds under the First and Second Mortgages by the end of the year. There was some question of whether we might use some of the funds received from the properties to acquire bonds so as to answer a contention that the Trustees had not been ready, able and willing to tender the necessary bonds for retirement. It appeared, however, that, since the Second Mortgage Bonds were payable in series, that the particular series, due in January 1934 and retired, would have to be acquired, and that it would be futile to attempt to acquire any other bonds. In consequence we concluded that there was nothing we could do along these lines and that we had better press the cases for trial in December unless we could conceive some [fol. 91] other expedient. Counsel was ready to try the cases but we and they were unwilling to do so while the First Mortgage Committee and the Trustee under the First Mortgage Indenture were furnishing fuel for Loew's defenses by advocating foreclosure. We continued unremitting in our efforts to change their attitude by persuasion, opposition to the foreclosure motion, opposing the segregation order theretofore consented to and finally pressing our application for sale of the Loew agreements. Counsel was adjourning this latter motion from time to time on request and by consent and we were hopeful of being able to make a dent in the attitude of the First Mortgage Committee before we should have to go to trial with Loew's.

We also discussed from time to time the possibility that Loew's might attempt to offset our claim with our own bonds, acquired in the market at reduced prices. We agreed that in any event we should defer the institution of the subsequent Loew action for the December rent for the time being.

We discussed with counsel the possibility of the necessity of amending the claim against New York Investors in the light of the testimony which had been adduced on the 21a examinations, and to file such additional claims as might be necessary in connection with the Ringling note collateral before the last day fixed by the New York Investors' order for the filing of claims against it. We discussed at length the situation of the Circus which now required an advance of approximately $200,000 to carry it over until the Spring and enable it to resume operations. We determined that we could not permit this to be done by use of the Atchison bonds since this would result in a reduction of the collateral. [fol. 92] We asked counsel to go into these agreements thoroughly to determine the respective rights of Allied and New York Investors and the Syndicate beneficiaries particularly, in the light of the fact that Allied held the guaranty of New York Investors and the endorsement of Mr. Ringling though the guaranties were probably not of great value at this time. Counsel did so and reported thereon. There were also complications respecting the failure to dissolve the railroad corporation through which claim was made by Ringling individually to the Atchison bonds.

There was some additional information as to pictures that had been spirited away from the Museum, and it was suggested that we might examine in our proceedings to get the facts for use in Florida. We undertook to locate witnesses for this purpose.

We discussed various plans or reorganizations and modifications thereof. The First Mortgage Committee was beginning to appreciate their counsels' advice as to the necessity of cooperative action in the face of the necessity of trying the Loew suits.

The Referee held, on a consideration of the Trust Indenture, that Halsey, Stuart were required to hold the moneys deposited with them for payment of interest. Since this coincided with our opinion we were not disposed to go further in the matter.

We were continuing our consideration of the Circus's financial situation and seeking remedies. We were also considering the question of calling an expert with respect to Mr. Davison's fee.

We were likewise continuing to discuss obtaining the necessary list of bondholders. Counsel reported and dis-

cussed with us the conferences with the counsel represent-
[fol. 93] ing the First and Second Mortgage Bondholders Committees and the Trustee under the Indenture the form of the Manufacturers Trust Company segregation order.

Meanwhile the Manufacturers Trust Company was moving for leave to foreclose, to obtain the appointment of receivers and to enjoin the Trustees in Bankruptcy from control of the five parcels of real property mortgaged under the Indenture.

We were having some controversy with the Brooklyn Manhattan Transit Company about painting and were seeking to avoid unnecessary expense while avoiding controversy with the Brooklyn Manhattan Transit Company.

We got additional accountants' reports, and we succeeded in obtaining the bondholders' lists from Halsey, Stuart & Company and the two other banking houses which had issued the bonds. We finally determined that it would be safe to rest on the opinion of the Referee respecting the Halsey, Stuart decision.

The Brooklyn Paramount had been losing money and Extension Theatres Corporation needed money for continued operations. We were faced with the necessity of loaning to it $4,000 in consideration of a similar loan by Paramount, to avoid closing down, and we concluded to make the loan since it was really a mere reduction of rent, though in another form.

We were discussing a possible settlement of the controversy with the Fremont Ohio Trustees, but it was necessary that we have Realty Associates' consent at the same time; we could not pay out any money of the estate in settlement of this claim unless we were sure that Realty Associates would not foreclose out our interest in the property. Realty Associates continued to threaten to foreclose and
[fol. 94] pressed for a segregation order which should be an adjudication of their rights.

We determined to get a complete report on the open taxes and the pending insurance on all properties so that we might determine what our attitude should be with respect to Loew and Paramount obligations which had not been met and our own obligations to Realty Associates out of the segregated funds.

We determined to retain Matthews Brown to make a supplemental audit at a fee not exceeding $500. We were

unable to come to an agreement with the First Mortgage Bondholders Committee respecting the compensation to be paid their accountants. We discussed the question of the amounts that might be due to us from the Paramount Equity Receivers and Trustees for theatre operation in the Spring, and it was determined that this audit should be promptly made so that our claims against them might be expeditiously prosecuted. If necessary, we determined to subpoena and examine the books of Paramount and its Trustees in our proceeding. The Paramount Trustees were asking for fees in their proceedings, and we determined to make objection, but it was found on attending the meeting that sufficient objections had been made to place the matter before the Court so ours were not required.

Counsel had served our order to show cause why we should not be permitted to sell the Loew guaranty and assumption agreement for the benefit of the general creditors. The order which we obtained had contained a stay, and Manufacturers Trust Company felt that they might prevent the prosecution of their foreclosure application and subject them to contempt for a violation. We refused, however, to vacate the stay on consent.

[fol. 95] We pressed Loew's to give us security for unpaid purchase price instalments already accrued and as they might accrue hereafter. We had not obtained any attachments as originally intended after a consideration of the matter. Loew's had assured us of their solvency and their willingness to hold and segregate moneys available for our claim. This arrangement, however, was somewhat abortive, but we were having friendly conversations with Loew's respecting this matter and as well others that indicated the possibility of a friendly adjustment. We were unwilling to precipitate an unfriendly situation.

Counsel had given us an opinion that New York Investors had a right to hold for us the Ringling collateral as security for the payment of the Ringling note and also that New York Investors had no right to reduce any collateral to cash and use such cash in the transaction of the business of the circus corporation. This made the situation of the Circus critical again, and we conferred with representatives of the stockholders, who discussed the possible necessity of receivership if a loan could not be obtained from other sources.

We discussed the attitude of the Brooklyn Manhattan Transit Company respecting the painting and agreed that we should do everything possible to give them no excuse to claim a constructive eviction.

Counsel reported to us upon, and we discussed the question of the advisability of bringing actions against directors and officers of Allied Owners Corporation for damage sustained by the latter respecting loss on securities through the amounts paid by Investors, Prudence and Realty Associates in excess of the market prices, the amounts lost [fol. 96] through subsequent depreciation of such securities and the possible loss on the Ringling note, the question as to whether such a claim would survive the death of Mr. Mark and also as to the legal liability of the secretary of the corporation respecting certain of these transactions. Counsel was instructed to go into the 21a examination fully along these lines and report on the testimony of these witnesses. The Trustees considered the matter and finally instructed counsel to prepare a comprehensive report on the facts and the law.

The Ringling situation was further and thoroughly discussed, as were the relations between the New York Investors and Allied Owners and the loans of moneys to employees.

The Trustees considered the commissions paid to Halsey, Stuart & Company for their services in disposing of the bonds on First and Second Mortgages and the fees paid to Sullivan & Cromwell in connection therewith; also the authenticity of the advances on the Fremont and Glens Falls Theatres were investigated and discussed. The dividend of $300,000 paid to New York Investors in 1929 was likewise considered and discussed.

There were numerous conferences with representatives of Paramount who were anxious to cooperate to the end that the Loew suit should be successful since if it succeeded it would reduce Allied's claim against them. They offered to assist in obtaining the facts and records respecting the Loew-Paramount transactions.

An order authorizing us to retain Florida counsel on the Ringling picture suit had been prepared, authorized and signed, and there were conferences with Mr. Milan, who was so retained in New York and Florida.

[fol. 97] The Trustees considered affidavits prepared by counsel on the application to fix the proportion of the mortgage recording tax payable on the Glens Falls Theatre.

Our motion for a preference in the Loew actions had been granted and the cross-motion of Loew's for a preliminary trial of their equitable defenses was denied. This insured a jury trial in the first instance. After consideration, counsel was able to get a stipulation, in consideration of consenting to an adjournment beyond the first of the year, that the actions be tried as of December 20th, so that Loew's could not raise the defense of actual failure of consideration subsequent to December 20. This satisfied the contingency we were seeking to avoid, i. e., the failure to retire principal on account of the mortgage indebtedness during 1934. We took up with Loew's the matter of security, instructing counsel not to consent to further adjournments, if possible, without getting adequate security.

The Manufacturers Trust Company had moved to vacate the stay granted by the Referee and then had made its motion for leave to foreclose. It likewise moved to vacate and modify the segregation order. These applications, of course, were the subject of serious consideration on the part of the Trustees and their attorneys. We finally came to the conclusion that the thing to do was to allow the Trust Company to take such action as might be required as a matter of law to fix its lien or claim on the rents, since the Trust Company claimed that the segregation order gave them no real legal rights to the rents we were collecting, and that probably was true, but we determined to strenuously oppose the foreclosure on the ground that this Court [fol. 98] was justified in refusing to permit foreclosure as a matter of law, and by virtue of the implied consent given at the time of the original segregation order, by reason of the possibility of interference with the prosecution of the claim against Loew's, and because there would be a substantial equity for the unsecured creditors if the estate was permitted to prosecute its claim against Loew's and Paramount. What the Trustees wanted was to defer any foreclosure until such time as the Trustees could demonstrate by a trial of the suit against Loew's that there was a good claim against Loew's and then, using the amount of that legally established claim as a basis, the Trustees would be able to demonstrate to the Bankruptcy Court that there

was an equity for the unsecured creditors and the junior lienors that should as a matter of law prevent foreclosure and permit sale free of liens in aid of reorganization. This was, of course, the crucial point in the entire situation. Were the Manufacturers to succeed and foreclose, in the opinion of the Trustees, not only would Loew's have been furnished with an adequate defense, but the efforts of the Trustees to secure cooperation by a reorganization plan that would save the rights of the juniors and the unsecured creditors would have been rendered futile, the equity of the latter destroyed, the general estate depleted to a point of diminution and all previous efforts of the Trustees to secure substantial return for the unsecured creditors rendered utterly futile and set at naught. On the other hand, were it possible to defeat the Manufacturers Trust Company's motion or only to defer their foreclosure, the pressure that was being put upon the First Mortgage Bondholders Committee and the First Mortgage bondholders, and particularly the effect of even a successful lower court's [fol. 99] conclusion against the Manufacturers Trust Company and perhaps also against Loew's, would have the psychological effect of inducing withdrawal from the unyielding attitude of the senior creditors, and have the effect of saving the claims against Loew's and Paramount, and rehabilitating the estate by reorganization.

Meanwhile the Trustees were carrying on with the Ringling situation in New York and the Circus situation in New York and in Florida, with Realty Associates insisting on segregation. The Trustees were seeking to prevent the Trustee of Publix-Ohio from proceeding against the Fremont Equipment and discussing with Loew's and their attorneys the question of security, having difficulty as a result of the losses being sustained by Extension Theatres Corporation in the collection of moneys due from it, examining audits and statements of Loew's Theatre & Realty Corporation and subsidiaries, pressing, through counsel, the motion, on the facts and the law, for leave to sell the Loew agreement and guaranty, but withholding and adjourning it from time to time at the request of the First Mortgage Bondholders Committee, attempting to locate witnesses for the examinations under Section 21a, giving consideration to the Ringling collateral, a foreclosure of the $130,000. Alpine mortgage having been had, and the New

York Investors Receivers having taken the position that they would protect the property covered by the mortgage by bidding up to $90,000 thereon. The Trustees considered this matter in the light of the respective rights and obligations of New York Investors to protect the mortgaged property by purchase, but agreed upon the necessity of an appraisal of the property for information purposes before commiting themselves to a definitive bid.

[fol. 100] Meanwhile extended conferences were had concerning the Ohio matter, and a tentative agreement was made, subject to the approval of Realty Associates, that a new subsidiary would be formed by Paramount which would take a lease from March 1, 1934 at a fixed minimum, and that the claim of Publix-Ohio would be composed in connection therewith.

We were still continuing the controversy with Realty Associates on their segregation order, and the Manufacturers Trust Company's application to foreclose had been adjourned. Notices had been sent to creditors to file their claims, the time expiring on February 8th, six months from the date of adjudication.

The Davison fee controversy was continuing. Mr. Davison had not pressed his claim for payment of a fee in excess of $10,000 and we had determined that it would be an unnecessary expense to retain expert witnesses. We contented ourselves with instructing counsel to cross examine fully and place all the facts before the Court, particularly since Mr. Davison's expert was a lawyer of standing and repute. The Trustees of Paramount-Publix had made a motion to amend their answer, claiming that the transfer by the Allied Owners of the Loew guaranty was voidable and seeking an injunction to our proceeding to recover payment on the Loew guaranty. This was a complication we did not appreciate since it was an unwelcome rift between us and Paramount in our attack on Loew's, we sought some means of curing this situation.

The Trustees' [illegible] report was prepared by counsel and filed, and Mr. Pe[illegible]er and Mr. Kelsey were being examined by counsel with respect to intercompany transactions. The [fol. 101] Alpine property was being sold under foreclosure and we were still advising an appraisal.

The Manufacturers Trust Company's motion was prepared and argued by counsel, and, with the cooperation

of the Court, it was agreed that the segregation order should be amended so as to more fully protect the Trustee under the First Mortgage in its claim to the segregated moneys collected as rents; that it should be permitted to institute a foreclosure proceeding in the United States Court for the Eastern District, but it could not proceed beyond the filing of a lis pendens and the service and filing of a summons and complaint, until further order of the court. This of course was satisfactory to the Trustees, short of a denial of the motion, because at least it deferred the matter beyond the date of the Loew trial and put the foreclosure situation utterly in the control of the court. The disadvantage of course, was the availability of the pendency of the foreclosure proceeding to Loew's as a defense.

We were discussing with Realty Associates its participation in the Publix-Ohio proceeding and seeking its cooperation in our proposed agreement with Publix-Ohio and the proposed lease of the Fremont Theatre with Paramount to the subsidiary. It appeared that the Receivers of New York Investors had bought in the Alpine property for $60,000 and we arranged for conferences with Judge Kelby concerning the resulting situation.

Throughout this period we were continuing our Paramount contacts with ultimate adjustment and reorganization in mind, and we were likewise working with counsel for the First and Second Mortgage Bondholders Committees and Thompson-Starrett Company in an effort to so improve the Plan of Reorganization that, in the light of [fol. 102] delay that the members of the First Mortgage Committee found they were suffering and which were only preliminary to the delay and jeopardy which would be caused by any real litigation, would move them to take a more reasonable attitude in their relations with the junior creditors. Counsel for the First Mortgage Bondholders Committee appreciated the prime importance of cooperation with respect to the Loew and Paramount claims and it may be readily said that so far as their obligations to their respective clients permitted. Counsel for both the First and Second Mortgage Bondholders Committee had become sympathetic with the efforts of the Trustees to save the equities for the junior and unsecured creditors and gave unstinted aid and cooperation in the formulation and preparation of plans that might furnish a medium of adjust-

ment and likewise sought to alleviate and moderate the controversies with the First Mortgage Trustee, which, it must be admitted, though severe and corporate in its attitude, at times, to a point that aroused antagonism was, in good faith, performing what it considered its duty to the creditors which it sought to represent.

We were having communications from creditors with respect to filing proofs of claim and gave them such assistance as was possible. Counsel reported to and discussed with us a great deal of negotiation and discussion with counsel for the First Mortgage Bondholders Committee and the Second Mortgage Bondholders Committee and the Trustee in an effort to again agree on a form of segregation order.

With counsel, we were having conferences with representatives of Paramount, who were claiming that the assignment of the Loew guaranty to Allied was voidable because the fact the two of the directors of Allied were also direc- [fol. 103] tors of Paramount to the end that this defense be withdrawn, so that we might unite in pressing the claims against Loew's; this was finally accomplished on our agreement to leave that question open and undetermined as between ourselves and Paramount regardless of the failure to raise the question in the Loew suit.

Paramount seemed willing to close the Brooklyn Paramount Theatre down. We felt that it was important that we keep it going, because of the picture franchise and particularly so because this would hasten the prosecution of the threatened foreclosure of the first mortgage and likewise in contemplation of the negotiations with Paramount for a settlement of our claim. We also took up the question of having audits of the various theatres made again.

Throughout this period we continued to meet with the First Mortgage Committee and its counsel and with the counsel for the Second Mortgage Committee for discussion of plans of reorganization, prosecution of the Loew suits, the status of the Paramount claim, the foreclosure, etc. We were discussing with Mr. Shea a more permanent arrangement for the Fremont Theatre in lieu of making an arrangement with Paramount seeking to get a better rental and, feeling too, that the cooperation of Shea and Paramount was really necessary for a firm deal because of Shea's ownership of the competing theatre. This was par-

ticularly important because Paramount was not offering a responsible leasee and very little security.

We were discussing with counsel preparation for trial of the Loew actions. We were considering the question of whether the bonds had to be filed with proofs of claim in the Referee's office in view of the provisions of the Bank-[fol. 104] ruptcy Act, which required deposit of original instruments and permits the substitution of a copy.

We were advised that the Circus could borrow $150,000, which would carry it until the Spring, from an independent source, if the Trustees would make no objection and permit them to do so. We concluded that we had the legal right to do this though it would subordinate the stock interest held by New York Investors as collateral to this additional indebtedness. We felt that this was good business judgment and the exercise of a sound discretion and therefore made no objection.

We arrived at a form of a proposed plan of reorganization which really seemed to offer a promise of cooperation by the First and Second Mortgage Bondholders' Committees. This was the result of active cooperation and to a large extent the result of these efforts of counsel for those Committees.

In consequence, we arranged to take no further action on our application to sell the Loew claims and instead to concentrate on pressing the Loew claims in cooperation with counsel for the First and Second Mortgage Bondholders Committees, so that, once we succeeded against Loew's, the payments to be made by it would constitute the basis upon and the fund through which we could reorganize. It was arranged that we should all cooperate in discussing all matters in controversy with Loew's and Paramount as well as the strategy to be adopted respecting the prosecution of the actions. We were promised the cooperation of the Committees in avoiding foreclosing and obtaining the cooperation of the First Mortgage Trustee.

The effect of this unity of effort and action produced immediate result in the prosecution of the Loew action. [fol. 105] Mr. Greve had been quietly consulting with officials of the Loew Companies for some time with a view to adjusting the payments called for under the agreements along lines more compatible with existing conditions and less burdensome in view of the depreciated receipts enjoyed by all motion picture theatres. It was difficult, however, to

make much headway so long as counsel advised of the Possibility of foreclosure making the defense of anticipatory breach, one of actual breach. Once that situation was relieved, these efforts began to bear fruit particularly when they had the approval and cooperation of counsel for Loew's.

We kept following up the Paramount matter as heretofore and made our demands on Loew's for the February instalments.

We had further controversies and questions of policy to determine with respect to the Brooklyn Manhattan Transit Company's lease.

We could now agree with Realty Associates on a form of segregation order. Our counsel worked with counsel for the First Mortgage Committee on the preparation of a trial memorandum in the Loew matter. We worked with counsel for the First Mortgage Bondholders Committee, counsel for the Second Mortgage Bondholders Committee and counsel for the Thompson-Starrett Company from time to time on modifications of the plan of reorganization, particularly as our conferences with the attorneys for Loew's and the officers of Loew's developed along lines of settlement. Mr. Greve continued his discussions all through this period at frequent intervals with the executives of Loew's on the settlement of the business end of the deal in an effort to fix amounts and time of payments and other business [fol. 106] terms. The problem, of course, was to now keep the various interests coordinated so that the negotiations might not be jeopardized by too many negotiators, and, once the various interests with whom we had been in conflict agreed, there was no difficulty in securing active and complete cooperation. During this time we were concerned with the form that our reorganization should take, once we had agreed upon the substance, and there was a good deal of consideration and discussion of the law with our counsel respecting composition and sale free of liens in foreclosure as being the best means of accomplishing our end. Our counsel was continuously engaged on these legal problems.

Meanwhile and from time to time there were proposals in Congress respecting a new reorganization statute and we and our counsel and counsel for various committees all had drafts of these proposed bills that were then in Committee and we were engaged in studying them and studying

our proposed business plans of reorganization so that they might conform. We were likewise engaged in studying the respective rights of the bondholders and the other creditors so as to determine how those rights could be legally modified to effect the practical results desired.

We, with our counsel, were considering the various stipulations and terms of settlement with Loew's, how payment should be made now and in the future, what disposition should be had as to past due payments, taxes, what assurance of payment we should have, what form a settlement should take, whether we could handle the matter as a compromise or as a sale free of liens, whether Loew's should get title now or hereafter, whether they should remain [fol. 107] under conditional contract or give a bond and mortgage, what form of guaranty we should have; the avoidance of the effect of bankruptcy on a proposed lease to a subsidiary; the effect with respect to profit taxes of any of these methods and proceedings, how a composition might affect the situation, to what extent State statutes might be applicable as to the New York properties so as to permit reorganization through the application of the State Schackno or Burchall Acts, to what extent dissenting creditors might be entitled to be paid under these circumstances, and many like and collateral questions.

The Government tax claims had been filed and we were to file objections thereto.

We were still negotiating with Shea, who was very anxious to get the Fremont house instead of having Paramount get it, we were keeping Paramount interested, however.

Brooklyn Manhattan Transit Company was still complaining about lack of painting and we were trying to satisfy them. We were communicating with the First and Second Mortgage Bondholders Committees and their counsel and frequently with the Trustee under the First Mortgage and its counsel as to many of these matters of any importance and likewise keeping in touch with the Reconstruction Finance Corporation representative in an effort to keep him up to date and get his concurrence in what we were doing.

Meanwhile, our counsel had received the bill of complaint of the Manufacturers Trust Company for foreclosure. This we studied, and we discussed the answer thereto, which our counsel then drew and later filed. The Manufacturers Trust Co. were not committed to our plans; from time to time

[fol. 108] they attempted to go along with us and the First Mortgage Committee but sporadically made objection and threatened to pursue their legal remedies. We negotiated with Loew's in an effort to reach a written agreement expeditiously, constantly with the threat of action by the First Mortgage Trustee hanging over us.

The conferences with Loew's counsel in which counsel for the First and Second Mortgage Bondholders Committee, constantly, and counsel for Thompson-Starrett Company, frequently, participated were marked with difficulty of agreement on substance and verbiage. Frequent drafts, revisions and modifications of agreements and stipulations were made and tendered but without agreement. These conferences and resultant drafts, considerations of questions of fact and law occupied our counsel and frequently ourselves daily and uninterruptedly for months and were attended by numerous and difficult negotiations.

We continued to negotiate with both Paramount and Shea regarding the Fremont lease. We told Paramount we would not take a dummy corporation as the lessee and we also explained to its representatives that Shea would have to be disposed of if they were really going to take a lease and live up to its terms. We told Paramount that we had the offer from Shea and invited a better one.

We were in conference with Mr. Levis, the attorney for the bankrupt, concerning the answer to be made in the Manufacturers' suit.

We continued to have conferences with Ringling and his attorney in an effort to dispose of his claim for rescission and to get his consent to release the collateral so as to pay our note.

[fol. 109] During this period we were still engaged in revisions of the reorganization plan, and at this time we agreed upon a general form of amendment that was generally satisfactory to' everybody of importance in the matter.

During this period of conferences on the Loew settlement, which was tied in with plans for reorganization we instructed counsel to make the necessary agreements with Paramount for credit on their claims of the amount to be received from Loew's to induce Paramount to consent to the disposition we sought to effect with Loew's. At this point we were discussing the possibility of drawing a stipulation of settlement in the Loew matter which contem-

plated payments on a basis theretofore agreed upon, and discussed with Loew's representatives, counsel for the First Mortgage Bondholders Committee and counsel for the Trustee under the First Mortgage Indenture, organization by Loew's of a corporation and leasing property to the main Loew corporations. The form that the settlement should take was complicated by Loew's desire to avoid unnecessary tax obligations and the necessity of our doing likewise. We had frequent conferences with our accountants and with Loew's accountants and various of the Loew's executives along these lines. Our counsel was undertaking to draft a petition for approval of the settlement and the collateral stipulations required from Paramount. Our counsel examined the theory that we could effectuate a compromise by drawing a petition for leave to sell the properties free and clear of liens, providing the liens should attach to the proceeds and discussed their legal conclusions with us. The First Mortgage Committee had adopted the amendments to the plan of reorganization and these had [fol. 110] been submitted to the Reconstruction Finance Corporation, and, awaiting its reply, had also been submitted to Thompson-Starrett.

We were discussing with the First Mortgage Committee's counsel and with Mr. Hunt, representing the Second Mortgage Committee, the mechanics of reorganization. We were more or less committed to avoidance of foreclosure by recourse to the bankruptcy procedure. There was a diversity of commitment between composition and sale, and we worked with counsel on an actual draft of reorganization plan in the form of an offer of composition and circulated that for comment among variout interested parties. Considerable work was done on this, and although there was a preponderance of opinion which seemed to favor a sale free of liens, there were necessary examinations by counsel and consideration by us of the existing law with respect to these matters, and, among other questions, we discussed with our counsel and had them make investigation as to whether there might be a sale of all the assets for securities, the securities to be distributed by the bankrupt estate under composition as a final distribution; whether secured claims might be disposed of by composition or by sale without an upset price that would be a basis for cash distribution to dissenters; whether, if there was a foreclosure, there could be a sale with an arbitrary upset

price without regard to existing statutes respecting deficiency judgments. It was, of course, imperative that there should be no deficiency judgment in the event we had recourse to foreclosure. One of the difficulties with respect to the bankruptcy practice was in making payments to creditors' committees and counsel for the work which they were doing and would necessarily do in connection with these matters.

[fol. 111] There was an offer for the Alpine property held as collateral on the Ringling note, of $93,000 cash, excepting the 1934 taxes, purchaser to pay broker's commissions. Mr. Kelsey wanted to know the Trustees' attitude with respect thereto. We again suggested that the property be appraised and sought to determine if there was a possibility of getting the cash received on the sale applied on account of our note.

We were continuing our negotiations with the Trustees of Paramount, indicating our desire to litigate the claim while they were similarly expressing their willingness to do so.

At the same time, Mr. Shea was making a better offer than Paramount had made for a lease of the Fremont, Ohio, property, but we still were unable to make a definite arrangement with Realty Associates for a continuation of their mortgage so that we could clear up the equipment situation.

We were faced with the necessity of making up an income tax return for the entire year for the period preceding the bankruptcy and subsequently thereto. Since Allied had filed consolidated returns, we had the question of whether we should elect to file a separate return or join in a consolidated return. There were some very difficult problems in connection with the tax returns, and our course of action respecting Paramount and Loew's was bound to be an important factor in determining tax liability, for the situation in the past had been so handled that payments which were received on account of the purchase price were not treated as profits but allocated between cost and income and, should we legally repossess ourselves of any of the property sold to Paramount, we were facing the possibility of being com-

[fol. 112] pelled upon such repossession to pay a tax representing the difference between the then value of the prop-

erty and the cost thereof as reduced by the portion of the payments previously made and so charged. There were questions whether the net receipts from the operations of the theatre should be considered capital items of payments on account of the past due instalments of purchase price or as income. The tax returns had been made up in the past on a cash basis, with deduction only of interest actually paid to the paying agent on the bond issues. In the present situation, if we were to continue on a cash basis, we would charge off the July 1933 interest which was not paid, though the contrary would be true if we accounted on an accrual basis.

We were being pressed in Ohio—this was in retaliation for our efforts to get a higher rent through Shea—but we successfully made efforts at the New York end to secure adjournments of the Ohio proceedings.

We had a controversy with the Extension Theatres respecting insurance on the personal property in the Brooklyn Paramount Theatre other than equipment. The particular articles were described as objects of art and consisted of about 300 pieces. An investigation disclosed that a Paramount subsidiary had previously carried the insurance on this property. It was proposed that the insurance should be continued by Extension Theatres, with interest payable to everybody, so that no one's rights would be prejudiced. The lease with Extension Theatres reserved all rights respecting personal property, and under the circumstances the Trustees felt that this suggested arrangement was fair.

We arranged to get bids to paint the Brooklyn Manhattan Transit Company's offices.

[fol. 113] The Trustees after consultation with counsel decided to file an independent tax return. We decided that this situation was so thoroughly tied up with the proposed Loew settlement and the ultimate disposition of our claim against Paramount, as well as the existing blanket claim of the Government for previous years' additional taxes, that it would be well to obtain the services of Mr. Lawrence A. Baker of Washington, D. C., who had been retained by the other corporations to advise concerning all of these matters.

We made demand on Loew's for March payments and instructed counsel to proceed with the actions against employees and sent them the original notes.

We continued the negotiations with Paramount concerning the Ohio situation. We were continuing our negotiations with Loew's and adjourning the cases accordingly.

We started discussions with Realty Associates with a view to arranging for an extension and readjustment of the mortgages on the Fremont and Glens Falls Theatres to the end that we might settle the extent of their participation in the Paramount claim, so that when we came to settle or litigate with Paramount we would have an agreement with Realty Associates that would not disturb our prosecution of the Paramount claim, and likewise for the purpose of enabling us to make a definitive agreement respecting the Fremont Theatre and equipment that would not be disturbed by a foreclosure.

The attorneys for the First Mortgage Trustee objected to our redecorating the Brooklyn Manhattan Transit Company's offices.

The stipulation of settlement with Loew's was the subject of constant conference and it was taking definitive form. [fol. 114] We instructed counsel to obtain authority for us to pay to the mortgagees of the Fremont property moneys from the segregated account on account of interest in an effort to promote our negotiations with them.

We notified the attorneys for the First Mortgage Trustee that we did not feel justified in taking the risk of having the Brooklyn Manhattan Transit lease voided and that we proposed to exercise our judgment in the matter and do the necessary decorating.

The conferences with Paramount were lagging and required a show of force on our part, at this point and we discussed and undertook to have prepared statements of law with respect to the main question at issue between us and Paramount, i.e., whether our claim against Paramount constituted a provable claim or whether the same was a contingent claim not due at the time of the adjudication in bankruptcy and likewise as to the measure of damages. We likewise took up and discussed the matter of making objection to the Government's tax claim and discussed the question of making objections to claims generally where justified, after complete tabulation of all general claims, the time for the filing of which had expired.

We were engaged in making investigations respecting the gross rental and net income of the Birmingham Theatre, its

assessed valuation, the same with the Glens Falls and Fremont Theatres, for the purpose of figuring with Paramount valuations on the theory of sale or lease as part of our settlement negotiations with Paramount. We continued our negotiations with Paramount Trustees, which were essential in order to obtain their consent to the Loew settlement [fol. 115] and without which Loew was unwilling to settle. It was suggested by Paramount Trustees as a basis of settlement of our claim against Paramount that we might sell Birmingham, Fremont and Glens Falls Theatres to Paramount for a total of $650,000 in cash or its equivalent. (This compares with the present proposed settlement which we have succeeded in negotiating with Paramount, which calls for their purchase of the Birmingham property alone for $1,000,000.)

They also then expressed a willingness to rent the Brooklyn Paramount Theatre at a rental of $80,000 gross per annum (they have since agreed to rent it at $100,000). They suggested also that they would settle the balance of our claims for $750,000 (they have since agreed to pay $5,000,000.). We were likewise discussing the income possibilities of the Fremont and Glens Falls Theatres in an effort to agree with Realty Associates on a rate of amortization of principal and a rate of interest that would enable us to carry the properties without liability and without possibility of default in the event of an extension of the mortgages. The length of time for which Realty Associates would give an extension was also a moot question.

The list of bondholders who had filed claims, when completed, came to three hundred odd pages, and the summaries and tabulations were the subject of conferences. Both Trustees under the Indentures had filed blanket claims in the full amounts of the outstanding bonds. The Receivers of New York Investors had filed claims for $4,198,384.21 and $490,455.45 respectively, (the latter being the Third Mortgage claim) and also for $200,000, which was the note that has been turned over to Reconstruction Finance Corporation and for which the latter had also filed. The Trustee [fol. 116] of Publix-Ohio had filed a small claim for architects' fees on the construction of the Fremont Theatre, which we disputed, and the Collector of Internal Revenue had filed tax claims for over half-a-million dollars. All of these were the subject of investigation and consideration

and we instructed counsel to file the necessary objections and prepare for hearing thereon.

We considered the question of whether the proposed extension of mortgage with Realty Associates was a compromise that required approval of creditors or whether the Trustees had power to act without order, and we discussed the question of payment of taxes out of the segregated funds from Glens Falls and Fremont Theatres. We feared that payments of taxes would act as a precedent that would move Manufacturers Trust Company to insist on similar action on our part respecting the other five theatres. We opened the necessary bank accounts to segregate the funds received from the Fremont and Glens Falls Theatres.

Together with counsel we considered the matter of filing objections to the mortgage Trustees' blanket claims, at least to the extent that individual claims had been filed by bondholders.

Mr. Greve and counsel were giving constant attention to the Paramount situation and the effort to formulate a reorganization plan as well as to the internal situation in Paramount, the acts of its Trustees and their various proceedings in connection with their effect on a possible settlement or a litigation of our own claims.

We authorized the retention of Horowitz, Farrell & Co. as accountants, but the application to retain them submitted to Judge Galston was denied by him.

[fol. 117] We were obtaining, meanwhile, extensions of the time on the motion made by Realty Associates for leave to foreclose, and attempting to work out the details of the extension agreement. The First Mortgage Committee was not very sympathetic with these efforts, feeling that the equity in these two theatres did not justify the effort we were making. We, on the other hand, felt that their retention was important from the standpoint of our prosecution of the Paramount claim, and it is to be noted that the proposed Paramount settlement includes a very substantial amount as representing pro rata claim for the purchase price of these theatres under the former agreements.

We were continuing our negotiations with counsel representing Loew's, but we were having difficulty in convincing Loew's counsel, for instance, that when we expressed a willingness to give them title now they would have to take their own title risks. Throughout this period our counsel were

attempting to meet constant legal objections on the part of counsel for Loew's and were attempting to modify the agreements and our reorganization plans so as to satisfy the legal technicalities that were being urged.

The negotiation with Loew's and the consequent delays became such that the Trustees were compelled to again indicate their willingness to try the cases, and during this period to make good our offer, there followed a considerable amount of activity with counsel in preparing, on the facts and the law, going through the documents and data,—all in preparation for going to trial, although we were morally certain that there would be no occasion to; we felt, however, that the best insurance against trying the case was to be ready to do so, and it is fair to say that in this connection [fol. 118] the case was prepared for trial by counsel not less than two or three times during the period.

We determined that the Trustees should hold the employees' collateral in fairness to them, since the market price thereof was so low, and proceed with the suits against them to compromise or trial. We went into the question as to our right and obligation to sell the collateral, and counsel concluded that it would have to be sold, when sold, on the notice prescribed by the Lien Law, but that we might use our discretion as to the time of sale. We decided, however, that the fair method was to hold the collateral for an increase in value, both for the defendants' and our own sakes, since obviously we could only look to the value of the collateral in some of the cases where the defendant was financially unable to respond to a judgment.

We had a discussion concerning the future corporate administration of Extension Theatres Corporation, and determined that one or two of the Trustees should be appointed directors in the places of Messrs. Pender and/or Buckbee, that an arrangement should be made to pay off the note of $4,000 representing the money loaned by us to Extension Theatres Corporation the preceding Christmas season, and that we should have an audit to show the present cash position of the corporation.

We also discussed the extension with Realty Associates and authorized a 5% interest rate for a three-year extension, without fee, a $10,000 principal amortization, to commence three months after the discharge of the Trustees, provided the First Mortgage Bondholders Committee would

consent. We agreed that, should this be done, we would consent to pay taxes meanwhile.

[fol. 119] We discussed and considered from time to time the tax claims of the Government, the situation respecting the theatre equipment generally; the claim against Paramount; the Loew suit; the proposed reorganization agreement; the compromise with Loew's and other miscellaneous matters.

While the provisions of the lease with Extension Theatres provided that Allied should pay the insurance, we looked into the question of whether we could get Paramount to pay half the insurance, for which we had received a periodic bill of some $5,650.

Counsel took up with Judge Galston the matter of the rejection of the order for the retention of the accountants and explained the situation to him, and he expressed his willingness to pass upon a new application.

We got a report on the Extension Theatres audit which showed that they had some $39,000 on deposit. It showed that they were behind in their payments for operation approximately $32,000. We agreed to pay for the fire insurance but to keep the term down to one year.

We took up again the claim against the Paramount Trustees for their net receipts for use and occupation during the equity receivership, and continued our discussions with Realty Associates and likewise continued our discussions with Loew's counsel. All of our negotiations with Loew's counsel and Realty Associates were either participated in by counsel for the First and Second Mortgage Committees, or we communicated with them separately and kept them apprised of the progress of the matter. Throughout this period we were working in unison, towards a common purpose, with a common understanding of our objective.

[fol. 120] We had counsel look into the question of the right of the Trustees to extend the Fremont and Glens Falls mortgages and report and they and we were satisfied that we could do so.

We let a contract for the Brooklyn Manhattan Transit painting at an aggregate price of $4,700; which was the lowest of four bids, the highest bid being $7,000, and we obtained a completion bond of $2,000 for the faithful performance of the work.

We went through the testimony in the 21a examination, and in particular that of Emily Ringling.

We made demand on Loew's for the April instalments. The First Mortgage Committee suggested that we have a more detailed operating analysis of the Glens Falls and Fremont Theatres before they were willing to commit themselves to the policy of obligating ourselves on an extension agreement. The suggestion was made that there should be a subsidiary corporation that should go on the extension agreement.

The complaints in action against employees were being drawn by counsel and were examined and signed by us.

The stockholders' meeting of Extension Theatres was called, and we discussed our proposed course of action respecting it. We discussed with the Referee in Bankruptcy the necessity of permitting him to hire help and space for the indexing, classification and filing of claims in the estate. He made the necessary arrangements, and we agreed that we would pay the bills.

We arranged for and received a report of the unpaid taxes on the three Loew Theatres and Brooklyn Paramount. [fol. 121] We were discussing the question of who of the Trustees should be elected a director of Extension Theatres.

There was a fire in the Birmingham Theatre, for which we arranged to file proofs of loss.

We looked into the matter of the adjustment of the capital accounts on the five theatres.

Our counsel was drafting and redrafting and considering with us stipulations and proposed agreements with Loew's and changing the mechanics and the substance to fit tax complications and legal objections. (This statement is not repetitious; this went on constantly from January to June.)

At this time we were pressing Loew's for security for unpaid and past due instalments. We were continuing controversies as to title. Loew's wanted not only an assurance of title from the Title Company, but if any question was raised they wanted the right to bring, and to require us to bring, an action designed to obtain an adjudication of the validity of title from the Court of Appeals of the State of New York. They refused to take a Federal Court adjudication. They would not be content with the privilege of instituting an action themselves for a declaratory judg-

ment. They insisted that, if they decided that that action might be ineffectual, they could require us to bring an action against them for specific performance, and wanted us to agree that, in any contingency we would cooperate with them, though we had been successful below, in taking the case to the Court of Appeals. This is merely one of the many difficulties and complications we were encountering. By this time upon the reports of counsel, we agreed that the proper method of solving the mechanical difficulties was to bring on a motion to approve a compromise and to [fol. 122] confirm a sale free of liens; drafts of a petition for leave to compromise consisting of some thirty-four typewritten pages were prepared by counsel and submitted to us in anticipation of approval by Loew's and the First Mortgage Bondholders Committee of a form of agreement with Loew's to accord with this practice.

We were working with counsel on the bondholders' list in an effort to determine the number of bondholders of each class, the total amount of bonds held by each, obtaining an indication of whether the bondholders had filed with the Committee or independently with the Referee, and whether they had designated attorneys-in-fact, &c.

We had obtained further adjournments of the Realty Associates' motion to foreclose. We agreed with them that we would transfer to them the balance of the segregated funds if applied to interest due on the mortgages, after approval of the Court. We were still attempting to agree with them and the First Mortgage Committee as to who should be the obligor on the extension agreement. With this exception we had come to a practical agreement as to details of the extension, and had obtained Realty Associates' approval to the Fremont Theatre and lease adjustment.

At this time, our counsel was preparing for a trial of the Paramount claim, which involved getting written statements from everyone who had any knowledge of the subjects involved, examining the 21a testimony theretofore taken, and making an exhaustive examination of the corporate proceedings of Paramount, their record of examinations or other records of the bankruptcy and the like. The matters were all discussed with and considered by us. [fol. 123] Having succeeded in getting the consent of Realty Associates, we were succeeding in bringing Mr. Shea

and Paramount together. We could not, however, agree to allow the architects' fee for which a claim had been filed, and upon the report of counsel we instructed them to make objections.

We filed our fourth report, and were arranging to have a continuation of business.

Mr. Davison had been defeated in the lower court on a question of law and had appealed to the Circuit Court of Appeals, and we conferred with counsel on this appeal and authorized a course of procedure.

We considered the question of what actions might be instituted against the various directors and officers of Allied, and discussed the matter fully.

We discussed the matter of the income tax returns.

We examined the minutes of the Extension Theatres and agreed that the stock which still stood in the name of Allied should be transferred to the Trustees.

We discussed the status of the various actions against employees and determined that we should get in touch with the defendants through our counsel and get a statement of their defenses and respective financial abilities, to the end that we might put through a fair compromise in each case, after notice to creditors in accordance with the Bankruptcy Act.

Counsel had prepared our answer to the Manufacturers' Trust Company bill of complaint, but the action was being held in abeyance by reason of Judge Inch's order and also by virtue of the pending settlement agreements.

[fol. 124] We discussed the matter of obtaining the appointment of a new Syndicate Manager in place of New York Investors.

We discussed the matter of the Ringling collateral. We had heard nothing more about the sale of the Alpine property, but discussed the question of getting an appraisal.

We discussed the matter of the income tax returns upon which Mr. Horowitz was then working, and suggested that he should be put in touch with Mr. Baker, who had been working on the consolidated returns, and we felt that this was necessary before we took any attitude respecting taxes. We discussed the necessity of obtaining an order for an accountant to pass on the income tax features of the proposed Loew's compromise.

We discussed with counsel the matter of objections to claims and agreed that we should have to object to all secured claims on the ground that the value of the collateral was in excess of the amount of the debt, so that the amount of unsecured claims might not be improperly increased.

We discussed the matter of the money in the hands of Halsey Stuart, respecting which a motion had been made and denied some time before. It appeared that some of this money had been in the hands of the Paying Agent for over six years, so that the bondholders' claims thereto had lapsed, but it appeared, on the examination of the Trust Indenture, that we should have to advertise, and, the amount of the money being so small compared with the cost of advertising, it was determined that the matter should be held in abeyance until, by lapse of time, a greater amount had accumulated.

We continued our attention to the Paramount and Loew matters. Mr. Greve was keeping up his close contacts in [fol. 125] the Paramount matter and reporting constantly. Mr. Flynn of counsel was keeping in touch with the legal proceedings and likewise reporting, so that, as far as possible, we kept a familiarity with that situation. Meanwhile we were continuing with counsel in our efforts to prepare the claim.

We discussed with counsel the matter of the objections to unsecured claims and objections to the New York Investors' claims, respecting which we were insisting on a bill of particulars, and we determined, should that not be furnished promptly, we would undertake to examine the representatives of New York Investors. In proceedings under Section 21A we determined that there should be an independent investigation of each of the claims filed and a reconciliation between the claims of Reconstruction Finance Corporation and those of Prudence, Realty Associates and New York Investors. Likewise, we determined that a checkup should be made on the Thompson-Starrett claim, and it was suggested that we determine whether this might be a lien on the property rather than a claim in personam against Allied. The claim against the Equity Receivers of Paramount was the subject of report of counsel, and we considered the question of whether our claim against them would be one for use and occupation, or whether we should attempt to determine what their net re-

ceipts actually were and seek to recover. The difficulty of the situation was enhanced by the fact that the actual occupation was by corporate subsidiaries of the Paramount, over which the Bankruptcy Court might have no summary jurisdiction, leaving us to plenary suit and consequent delay.

[fol. 126] The accountants' report as to receipts and disbursements had not, however, been completed, and this left us in a position where at this time we were unable to come to a decision.

There was an amount of tax that had been withheld from non-resident aliens, and for this the Government had filed a claim, and we determined that that claim was valid and, the moneys being available, should be paid.

We obtained and examined a complete record and inventory of all insurance. There were questions as to whether we should pay taxes instead of having the penalties run, particularly in view of the New York City increase in the rate of penalty. Previously there had been an objection to paying taxes because of the possibility of foreclosure, but now that that was disposed of there seemed to be no valid objection to using moneys properly applicable therefor.

The claim of the American District Telegraph Company, Inc., for watchman's services against the Trustees came up again, and was the subject of consideration. A compromise was suggested and approved and the claim was disposed of without further controversy.

We considered a report of counsel respecting his examination of the record of the Paramount hearings.

We discussed the question of whether there should be a general form of letter to be sent to bondholders with reference to the Loew settlement. The Extension stockholders' meeting was adjourned, and it was agreed that the $4,000 owing to us should be paid.

We attended some Circus meetings and conferences respecting the status of its affairs which had improved very nicely.

[fol. 127] We again gave thought to the question of whether we should continue to carry the large amount of cash in banks or make some investment thereof in a safe security. Recent decisions seemed to hold that a trustee in bankruptcy had no preference in the event of the closing

of a bank, but we determined that the Referee's adjudication covered the situation and besides the banking situation had cleared up.

We looked into the question of filing a tax protest on the Birmingham Theatre.

We took up the matter of collecting interest on some of the collateral held on employees' notes. We looked into the agreement by which the capital accounts were settled, with the thought that it might be of assistance in litigating the Paramount claim. We found this agreement and examined it closely.

We made demand on Loew's for payment of the May instalment of purchase price and the April taxes.

We were watching the Extension Theatres operation rather closely and discussing the statement of receipts and disbursements received each week. We discussed the pros and cons of the payment of real estate taxes by the Trustees in the light of the 10% penalty, and we took up again the matter of the enforcement of our claims against the Equity Receivers of Paramount.

The Manufacturers Trust Company expressed a willingness to attempt to approve the terms of our proposed settlement with Loew's if there were certain modifications thereof. There followed a good many conferences with this in view but the effort proved fruitless.

We had a rather heated controversy with the Labor Delegate in charge of the territory in which the Brooklyn Paramount is situated, as a result of his insistence that, because [fol. 128] we had four men tending the boilers in the building (although three of them were servicing the building rather than the theatre), all four would have to be paid on the theatre forty-hour basis instead of on the building forty-eight hour basis. This resulted in a claim of $612 for alleged past-due wages, and the Delegate threatened to call the men out if we did not pay the alleged claim for back wages. We found on investigation that there would be no difficulty in getting non-union men to fire the boilers and operate the elevators, and, after going into the matter fully and making inquiries, we came to the conclusion that the Union ruling was arbitrary and unfair and we threatened to close the theatre, which was not showing any profit anyway,—with the result that the threat was not effectuated.

We insisted with the Loew counsel that, unless we had an agreement in definite and final shape, we would go to trial. We insisted that we would not permit the cases to go over the summer, and that we didn't propose to hold the matter in abeyance further without ample security for the moneys accruing and not being paid, as well as for the taxes.

The Paramount Trustees issued a tentative plan of reorganization on the Paramount Building bond issue, which had our consideration, comment and objection.

The Manufacturers Trust Company threatened to proceed with the foreclosure if we did not meet with greater expedition on the part of Loew's.

We agreed that we would only continue the operation of Extension and Brooklyn Paramount for two more weeks, and then we would close down for the summer.

There were further discussions to substitute proposed new Syndicate Managers for New York Investors.

[fol. 129] We had reports on both settlements with Mahoney and Long and considered the same.

We were still pressing Loew's counsel and in touch with the attorneys for the Bondholders Committees, and took up the question of having New York Investors turn the Ringling collateral over to us. We likewise discussed the matter of having the Ringling interest paid directly to the interested parties to the extent of their pro rata share.

The Brooklyn Paramount Theatre was running behind and we pressed to close it down.

We discussed the necessity of retaining Ohio counsel in connection with the Publix-Ohio proceedings being had there, and we suggested that our counsel examine both Mahoney and Long as to their assets before accepting a proposal of settlement.

We agreed to use Matthews Brown for auditing work and Mr. Baker as our tax consultant, and agreed that Horowitz, Farrell & Co. should finish up the work they were doing and be paid therefor.

We arranged for additional conferences with Mr. Fox concerning the final terms of the Realty Associates' extension of mortgage and their consent to the Fremont compromise.

We arranged to see Mr. Barry of Lybrand, Ross Brothers & Montgomery and Mr. Keenan of Matthews Brown

so as to check the Paramount figures on the claim against the equity receivers. We determined that, if the necessary affidavits of financial condition were submitted, we would approve the Mahoney and Long settlements, and we suggested that counsel examine all of the papers, to get definite proposals from them, or proceed to judgment, particularly as to Schmitz.

There was a balance of $4,000 due from Mr. Shea for extra rent on the Fremont Theatre during the period of his operation, which he agreed to pay.

[fol. 130] There was a concensus of opinion that nothing should be done with respect to the Birmingham taxes for various reasons.

We arranged with the Brooklyn Paramount Theatre to shut down, and that the necessary work should be done to see that the furnishings were properly cleaned and protected.

It appeared that the New York Investors' Receivers were unwilling to relinquish possession of the collateral without Ringling's consent. Appraisals were obtained respecting the Alpine Mortgage and there had been a sale of the property for $100,000.

The Fremont settlement seemed to be in definite shape finally, with everyone consenting, and counsel was directed to put it in written form.

A stipulation submitted by Loew's was found unsatisfactory, but the petition which had been prepared by our counsel for submission of this compromise to the Court was found satisfactory to every one except as to one technical item left to be discussed with Loew's counsel.

The Paramount settlement discussions were taking tangible form, and we again looked into the question of the earnings of the various theatres so as to be in shape for a formal meeting with the representatives of the Paramount Trustees.

We went over the letter of Paramount's counsel and his draft of agreement respecting Publix-Ohio adjustment and made a good many suggestions for changes.

We insisted that we would not go any further in our negotiations with Loew's unless they immediately agreed to make deposits to cover the unpaid purchase instalments which now amounted to half a million dollars, without considering taxes and penalties. We resolved to stand by this [fol. 131] decision definitely and communicated the fact to

Loew's that we would consent to no further adjournments in the case unless the situation was secured by the making of this deposit.

We went over a draft of an agreement with Mr. Shea covering Fremont which Mr. Freeman was taking up with Mr. Shea.

In consequence of our insistence, Loew's agreed to give us security, but the offer was insufficient. We insisted that we had a right to attach and we should be put in a position of attaching creditors, and that in consequence the agreement should provide that $250,000 in cash or its equivalent in securities should be deposited in escrow at once; that within 90 days thereafter the deficit, which to September 1st would amount to approximately $350,000 more, should be deposited, and that thereafter monthly payments as they accrued should likewise be deposited, and we agreed that these payments might be held in escrow by a bank subject to the terms of a settlement agreement, and that if the settlement agreement should be terminated other than by a conveyance to Loew's, the funds should remain on deposit, the Trustees and Loew's to have the respective rights against the same that would accrue had we attached.

We were likewise continuing a controversy with Loew's with respect to payment of the tax on the mortgage proposed to be given under the settlement agreement which under the then arrangement came to some sixty thousand dollars. We were having some difficulty in getting the Paramount Trustees' consent, but Loew's was insisting on an indemnity agreement that was much too broad in the event of our failure to obtain such consent. These were a few of the many complications in that situation.

[fol. 132] Ringling again moved for permission to commence an action against the Trustees, and we considered his petition. We were going over drafts and redrafts of the proposed Loew agreements prepared by our counsel with counsel for Loew's, and having discussions concerning modifications and concessions. We were having conferences with representatives of Paramount respecting proposed settlements. We were pressing Loew's for security. We agreed with Realty Associates on a form of order determining their motion for leave to commence foreclosure that gave us sixty days, and then, upon a contingency, ninety days' delay.

We were served with a warrant of attachment and affidavit in a suit brought by Ringling.

We made demand on Loew's for the June instalments.

We consulted with counsel concerning and instructed them to prepare a certificate of return to the Ringling attachment.

We were working feverishly in an effort to agree on a Loew draft of agreement and the terms of a deposit agreement. We finally got Loew's to agree to deposit $250,000 at once and to deposit $41,666.66 monthly commencing June 1, 1934 upon an agreement that all other items in default should be paid immediately upon approval of the compromise. We made the necessary arrangements for deposit of these moneys with the Empire Trust Company. We compromised the claim of the American District Telegraph Company against us.

It began to look as if the Corporate Bankruptcy Bill was going to pass Congress, and the drafts which we were receiving indicated a solution of a great many legal problems that had been troubling us. We consulted with coun- [fol. 133] sel and Mr. Baker on the Loew settlement from a tax standpoint and particularly with respect to the questions of (1) whether the general method of settlement would subject the Trustees to any undue tax; (2) whether any saving of taxes could be effected by any modification of the mechanics, and (3) the effect from the tax standpoint of making allocation of the amounts to be paid by Loew to principal and/or interest. We had reports on the classification of claims. We considered the report of Horowitz, Farrell & Co. with respect to income tax return for 1933, took it up with Mr. Buckbee and determined to check it with Mr. Baker, and discussed the matter of filing a State franchise tax return, due July 1st, and likewise the capital stock tax return.

After consultation with counsel we agreed upon the form of order on Realty Associates' motion for leave to foreclose, and instructed our counsel to consent to it.

The settlement agreement with respect to the Fremont equipment matter was agreed upon and we signed the written agreement after modification as suggested.

We had an offer of settlement from Schmitz and we approved it.

We were informed that a tort claim by one McDonald against us had been settled.

New York Investors not having given us a bill of particulars, we instructed counsel to move to expunge their claim. We considered the question of moving to reduce the claims of the Trustees. We determined to hold in abeyance a special meeting of creditors until we were in a position to submit the Loew agreement.

The Corporate Bankruptcy Bill having been signed, and [fol. 134] it having been examined by us and our counsel, counsel for the various bondholders' committees, the bankrupt, counsel for Loew's and counsel for various creditors, we agreed that it offered a happy solution to many of the legal difficulties we had encountered, and a petition of 77b having thereafter been filed by the debtor, and we having been appointed temporary trustees on June 22, 1934, we thereupon turned over to ourselves, as such temporary trustees, all the property of the estate.

In conclusion, we might state that our efforts as narrated above were continued by us as Trustees under Section 77b, with the result that a plan of reorganization embodying a settlement with Loew's whereby they agreed to pay the sum of $12,875,000; a settlement with Paramount has been presented to a Special Master, with the concurrence of the great majority of the creditors, and will undoubtedly be approved; that this plan of reorganization involves a distribution to senior and junior creditors of securities at the rate of 100 cents on the dollar and interest, and it is to be anticipated that not only will the interests of the juniors be found to have been preserved in full, but the value of the stock of the corporation now in the hands of the Reconstruction Finance Corporation as security for advances by the Government should reflect an ultimate value.

We are advised and verily believe that we are entitled to receive, under the provisions of the Bankruptcy Act, construed in their application to the instant situation which involved a turn over in kind of assets by us as Trustees in Bankruptcy to ourselves as Trustees under Section 77b, and in view of our continuation of business, a maximum of two per cent upon the amount which passed through our hands, including the assets and property to which we had title and [fol. 135] which we turned over in kind or which passed by operation of law to ourselves as Trustees under Section 77b.

However, with due consideration of all of the facts, we have determined to request for our services in this and the 77b proceeding, two per cent upon the amount which passed through our hands but based upon the present value of the assets of the Estate. This makes a total of $284,119.92 as of June 22, 1934 (and is subject only to increase in the 77b proceedings by the amount of our receipts in that proceeding). We believe this to be a fair and reasonable allowance in view of all the circumstances and less than we might otherwise claim under the law. Consistency requires, in our opinion, allowance of one-half of such amount in this proceeding and the remainder thereof in the 77b proceeding since the payment comes from a common fund.

Accordingly, we herewith pray allowance in this proceeding in the sum of $142,059.96.

This application for a lesser sum than the amount for which we might apply and which might be properly allowed us, in our opinion, is made with the expectation that the Court may appreciate that we have given full consideration to all the surrounding circumstances in this situation with which we are familiar more than anyone else except our counsel, and consequently, seek only such sums as we believe we are justly entitled to and which we expect to receive for our services.

Dated, New York, January 28, 1935.

Respectfully submitted, (Sgd.) Percival E. Jackson, (Sgd.) William M. Greve, (Sgd.) Stephen Callaghan, Trustees in Bankruptcy.

[fol. 136] *Duly sworn to by Percival E. Jackson et al. Jurat omitted in printing.*

[fol. 137] STATEMENT FILED BY TRUSTEES IN BANKRUPTCY

Statement for Computation of Commission Fixed as Maxima Bankruptcy Act

Total Assets as shown by Final Account			$25,680,996.18
Possible Deductions therefrom:			
I.			
Assessed Value of Brooklyn Paramount Theatre	$4,800,000		
Appraisal by Mr. Charles O'Malley	1,000,000		
Possible Deduction from above		$3,800,000	
II.			
Claim against Loew's	$12,875,000		
Present Value	7,500,000		
Possible Deduction (Approximately)		5,375,000	
III.			
Paramount Stock	$5,000,000		
Estimated Present Value Outstanding on basis of Debentures	2,700,000		
Possible Deduction		2,300,000	
Total Possible Deductions			11,475,000.00
Net Total Assets			$14,205,996.18

[fol. 138] IN UNITED STATES DISTRICT COURT

[Title omitted]

Affidavits of Trustees in Bankruptcy Under General Order XLII

AFFIDAVIT OF STEPHEN CALLAGHAN

STATE OF NEW YORK,
County of New York, ss:

Stephen Callaghan, being duly sworn, says:

That this affidavit is made under and pursuant to General Order in Bankruptcy, number XLII, of the Supreme Court of the United States; that he is one of three Trustees in Bankruptcy of Allied Owners Corporation; that no agreement has been made directly or indirectly, and that no understanding exists for a division of fee between the affiant, the bankrupt or any of the officers, directors or agents, the other Trustees in Bankruptcy, or any of them, or the

attorney or attorneys, or any of them, except that the three Trustees are making a single application for allowances to them jointly and expect such allowance to be divided between them equally.

Stephen Callaghan.

Sworn to before me this 29th day of January, 1935.
(Sgd.) Thomas A. Gaffney.

[fol. 139] [Title omitted]

AFFIDAVIT OF PERCIVAL E. JACKSON

STATE OF NEW YORK,
County of New York, ss:

Percival E. Jackson, being duly sworn, deposes and says:

That this affidavit is made under and pursuant to General Order in Bankruptcy No. XLII of the Supreme Court of the United States; that he is one of three Trustees in Bankruptcy of Allied Owners Corporation; that no agreement has been made directly or indirectly and that no understanding exists for a division of fees between the affiant, the bankrupt, or any of its officers, directors or agents, the other Trustees in bankruptcy or any of them, or the attorney or attorneys for any of them, except that the three trustees are making a single application for allowance to them jointly and expect such allowance to be divided between them equally.

Percival E. Jackson.

Sworn to before me this 29th day of January, 1935.
(Sgd.) Joseph Appledorf.

[fol. 140] [Title omitted]

AFFIDAVIT OF WM. M. GREVE

STATE OF NEW YORK,
County of New York, ss:

William M. Greve, being duly sworn, deposes and says: That this affidavit is made under and pursuant to General

Order in Bankruptcy number XLII of the Supreme Court of the United States; that he is one of three Trustees in Bankruptcy of Allied Owners Corporation; that no agreement has been made directly or indirectly, and that no understanding exists for a division of fees between the affiant, the Bankrupt, or any of its officers, directors or agents, the other Trustees in Bankruptcy, or any of them, or the attorney or attorneys for any of them, except that the three Trustees are making a single application for allowance to them jointly and expect such allowance to be divided between them equally.

William M. Greve.

Sworn to before me this 29th day of January, 1935.
(Sgd.) Jos. G. Balling.

[fol. 141] In United States District Court

[Title omitted]

Petition of Attorneys for Trustees in Bankruptcy for Allowance of Compensation

To the Honorable Theodore Stitt, Referee in Bankruptcy:

The petition of Goldwater & Flynn (said firm being hereafter referred to as the "Petitioner"), for an allowance of compensation in full for services rendered as counsel to the Trustees in Bankruptcy of Allied Owners Corporation, the above named bankrupt, for the period from August 28, 1933 to June 22, 1934 inclusive, a period of approximately ten months, respectfully shows:

1. Adjudication in Bankruptcy and Appointment of Trustees and Counsel.

On August 8, 1933 Allied Owners Corporation, upon its voluntary petition in bankruptcy, was adjudicated a bankrupt, and thereafter Stephen Callaghan, Percival E. Jackson and William M. Greve were elected and duly qualified as Trustees in Bankruptcy thereof. By an order of this Court dated September 14, 1933, a certified copy of which is attached hereto as "Exhibit 1", the Trustees were authorized to and thereupon did retain the firm of Goldwater & Flynn as their counsel.

[fol. 142] Stephen Callaghan and Percival E. Jackson, two of the Trustees, were approved and immediately qualified. The third Trustee, William M. Greve, on account of proceedings with reference to his approval, did not qualify until September 14, 1933. Pending the determination of the proceedings with reference to the approval of the third Trustee, the two Trustees who had been elected and approved and who duly qualified, requested your petitioner to act as their counsel in advising them in and about the affairs of the estate. Your petitioner cooperated with the two Trustees in this matter and rendered valuable advice and services from August 28, 1933, prior to their formal retention by the three Trustees which was had immediately upon the qualification of the third Trustee. Your petitioner, from August 28, 1933 until June 22, 1934, acted and is now acting as counsel to the Trustees.

On June 22, 1934, upon the petition of Allied Owners Corporation filed under Section 77B of the Bankruptcy Act, an order was entered by the Court temporarily appointing Stephen Callaghan, Percival E. Jackson and William M. Greve, Trustees of Allied Owners Corporation, Debtor. Such order provided:

"IX. That all reasonable administrative expenses and allowances in the Bankruptcy proceeding No. 25012, which may be fixed by the Bankruptcy Court, shall constitute a charge upon the Debtor's estate, and shall be paid by the Trustees in accordance with the orders of the Bankruptcy Court without further order herein."

[fol. 143] Thereafter, pursuant to authority of the Court, the Temporary Trustees of the Debtor retained your petitioner as their counsel. By an order dated July 24, 1934, the Court made permanent the appointment of such Trustees. Thereafter, pursuant to authority of the Court, said Permanent Trustees retained your petitioner as their counsel. Your petitioner, during all of said time from said dates, acted and is now acting as counsel to the Trustees of Allied Owners Corporation, Debtor.

2. Amount of Time Spent by Your Petitioner as Counsel for the Trustees in Bankruptcy.

Throughout the period from August 28, 1933 to June 22, 1934, the services of petitioner, as counsel to the Trustees

in Bankruptcy, required considerable time and constant attention of a group of lawyers, including, during all of said period, the services of one or more partners of your petitioner's firm. The time spent by your petitioner and associates on this work during that period aggregates 4508 hours of work, of which 1485 hours represents work of partners of your petitioner's firm and 3023 hours represents work by attorneys associated with your petitioner. A large part of the work necessarily was performed after regular working hours and involved a great deal of night work and work on Sundays and holidays. The volume and intensity of this work is shown by the "Summary of Diary Entries" from August 28, 1933 to June 22, 1934 inclusive, showing the number of lawyers, partners and associates engaged in the work, the aggregate number of hours and the nature of the services rendered each day by your petitioner [fol. 144] in connection with the bankruptcy herein. This summary is separately bound and will be filed hereafter prior to the hearing on this application.

No compensation on account of said services has been received by your petitioner to date. The burden of financing such a large volume of work has been very great and your petitioner believes that it should now receive its compensation in full, as attorneys for the Bankruptcy Trustees.

The bankruptcy estate is a very large one, running into millions of dollars, and it is apparent that the preservation and conservation of its assets and the large recovery by your petitioner on claims and choses in action, amounting to millions of dollars, makes certain the effectuation of a plan of reorganization in the Reorganization proceedings, which will result in the payment in full of all creditors.

During the period from August 28, 1933 to June 22, 1934, there was a considerable improvement in the cash position of the bankrupt. As of the date of the election of the Trustees, the bankrupt had cash on hand and deposited in banks in the amount of $341,414.22.

As of June 21, 1934, the Trustees had on hand and deposited in banks cash, including cash segregated under segregation orders, in the amount of $602,912.62 after making various disbursements pursuant to authority of the Court obtained with the advice and consultation of petitioner, which disbursements totaled $124,512.95. This improvement in the cash position was accomplished without

the sale of any of the assets of the bankrupt and chiefly [fol. 145] through the continuance of the business by the Trustees with the direction, guidance and consultation of your petitioner.

3. General Nature and Extent of the Estate.

The legal services rendered by your petitioner cannot be adequately described without a statement of the nature of the bankruptcy estate and of the problems of administration thereof. The last published statement of accountants as to the value of the assets of Allied Owners Corporation, which statement was as of December 31, 1932, shows assets totaling $18,161,470.38. This figure cannot, of course, be taken as the realizable value of the bankruptcy estate; at the date of the bankruptcy.

Allied Owners Corporation, the bankrupt herein was formed in pursuance of an agreement in writing between Paramount Publix Corporation (then known as Famous Players Lasky Corporation), New York Investors, Inc. (then known as Realty Associates), and Thompson-Starrett Company, for the erection of theatre buildings. Allied Owners Corporation acquired seven parcels of real property, erected theatre buildings thereon, and sold the real estate and buildings to Paramount Publix Corporation on instalment contracts.

The buildings so erected and sold on instalment contracts are known and referred to as follows:

1. Brooklyn Paramount Theatre and office building, DeKalb Avenue and Debevoise Place, Brooklyn, New York;

2. Paramount Theatre, Birmingham, Alabama;

[fol. 146] 3. Paramount Theatre, Freemont, Ohio:

4. Paramount Theatre, Glens Falls, New York;

5. Loew's Valencia Theatre, Jamaica, New York;

6. Loew's Kings Theatre, Brooklyn, New York;

7. Loew's Pitkin Theatre, Brooklyn, New York.

The aforesaid agreement provided that upon demand of New York Investors, Inc. or Allied Owners Corporation, Paramount Public Corporation would enter into an instrument in form a lease with Allied Owners Corporation for

each theatre parcel, and instruments which were in form leases were so entered into between Allied Owners Corporation and Paramount Public Corporation, with respect to the aforesaid seven theatre properties. These instruments which were in form leases were each modified by respective modification agreements.

Paramount Publix Corporation assigned to Loew's Theatre & Realty Corporation its rights under the agreements, and Loew's Theatre & Realty Corporation assumed the obligations of Paramount Publix Corporation thereunder with respect to the parcels designated as Loew's Pitkin, Loew's Valencia and Loew's Kings, and assumed, among other things, the obligations of Paramount Publix Corporation to pay the respective purchase prices for [fol. 147] the said parcels. At the same time, Loew's Incorporated guaranteed to Paramount Publix Corporation performances by Loew's Theatre & Realty Corporation of all the obligations assumed by Loew's Theatre & Realty Corporation. Thereafter Paramount Publix Corporation assigned to Allied Owners Corporation the guaranty agreement of Loew's Incorporated, its rights and all benefits and choses in action thereunder, which might thereafter accrue or arise thereunder.

By the aforesaid agreements Paramount Publix Corporation agreed to pay to Allied Owners Corporation, as the purchase prices of the said parcels of real property, a sum for each parcel computed on the basis of a fixed amount, called the "Capital Account," which Capital Account consisted generally of the cost of the sites and the erection of the theatres, which Capital Account was payable in one hundred and eighty-one (181) monthly instalments.

At the date of the bankruptcy of Allied Owners Corporation, Paramount Publix Corporation had ceased making the monthly payments of the purchase price of the four properties retained by it, and was being administered in a bankruptcy proceeding pending in the United States District Court for the Southern District of New York. Loew's Theatre & Realty Corporation had likewise ceased making the payments of monthly instalments with respect to the three parcels of property occupied by it.

Five of the parcels of property above referred to, namely: the Brooklyn Paramount Theatre and office build-

ing, the Paramount Theatre, Birmingham, Alabama, the [fol. 148] Loew's Valencia Theatre, Jamaica, New York, the Loew's Kings Theatre, Brooklyn, New York and the Loew's Pitkin Theatre, Brooklyn, New York, were subject to three mortgage indentures, securing issues of bonds totalling approximately $11,374,000. Two of the parcels of property above referred to, that is, the Paramount Theatre, Fremont, Ohio, and the Paramount Theatre, Glens Falls, New York, were subject to mortgages aggregating $288,000.

In addition the cash received by the Trustees and on deposit in various banks and trust companies aggregated $341,414.22. Other assets indicating the extent of the bankruptcy estate included a note made by Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and Circus City Zoological Gardens, Inc., upon which there was an unpaid balance of $1,117,320.67, and in which the bankruptcy estate had an interest of $828,131.77. The bankruptcy estate also had six notes of various individuals upon which there was unpaid $107,937.28, which notes were secured by various stocks and bonds. The bankruptcy estate had also various other stocks, bonds and claims in addition to temporary leases on four of the theatre properties.

4. Nature and Extent of Services of your Petitioner.

The nature and condition of the assets of the bankruptcy estate required your petitioners to perform extensive services, not only in respect of the normal matters calling for the attention of counsel in a bankruptcy proceeding, such as administrative matters, claims and litigation, but also with respect to various complicated relationships between the bankrupt and affiliated companies and also with respect to [fol. 149] investigation of many complicated inter-company transactions.

The nature of the litigation was unusual in that many of the questions of law involved were novel and there were few precedents in the law.

At the commencement of the bankruptcy proceeding, it seemed highly probable that the secured creditors of the bankrupt might ultimately realize from twenty per cent to thirty per cent of their claims and the unsecured creditors might receive two per cent or three per cent of their claims.

Aside from the cash in banks, the Circus Note, and the fee title to real estate, which was a burden and financial

loss to the instalment contract vendees who were then attempting to escape from their obligations, practically the entire assets of the bankrupt consisted of undetermined choses in action which were subject to substantial defenses.

The preservation intact of the assets of the estate and the prosecution of these choses in action to recovery of more than twelve million dollars, clearly indicates the tremendous value of the services of your petitioner to the estate and to the creditors, both secured and unsecured, of the estate. It is no more than fair to note that these results were achieved in spite of opposition upon many sides.

On account of the nature of the litigation involved and the Loew's settlement agreement achieved, your petitioner was required to devote constant attention to the manner of effecting a reorganization plan and to the co-ordination of the Loew's settlement agreement and the reorganization plan.

The continuance of the operation of and the supervision of the seven theatre properties was essential to preserve [fol. 150] valuable motion picture franchises, all of which was done by the Trustees with the advice, guidance and consultation of your petitioner.

The Major Matters Requiring the Attention and Consideration of Your Petitioner Were as Follows:

5. Administrative Matters.

Your petitioner was required to consider a vast number of contracts in which the bankrupt was involved and to continually confer with the Trustees with respect thereto. The problems which arose in connection with the Trustees' administration of the estate involved legal questions which required continual conferences by your petitioner with the Trustees and with various of the officers and directors of the bankrupt. One or more of the attorneys connected with your petitioner attended at meetings of the Trustees which, during the early stages in the administration of the estate, were held on an average of twice a week and thereafter on an average of once a week. Petitioner prepared agenda for and reports of these meetings, and advised with respect to the legal matters arising at the meetings.

Pursuant to the request of the Referee, your petitioner obtained lists of probable holders of the First Mortgage Real Estate 6% Sinking Fund Gold Bonds and Serial 6%

Gold Debentures from bankers and other sources, caused the same to be compiled alphabetically, and filed the same as a supplemental list of creditors. This supplemental list of creditors consisted of one hundred and sixty-seven typewritten pages.

[fol. 151] 6. Claims Filed Against the Estate.

4092 separate proofs of claim were filed against the bankruptcy estate. Of this number, 4078 proofs of claim were made by individual holders of First Mortgage Real Estate 6% Sinking Fund Gold Bonds and Serial 6% Debentures which had been issued by the bankrupt. The remaining fourteen proofs of claim were claims on behalf of trustees of mortgage indentures, mortgages, and various unsecured creditors. The total amount claimed in the last mentioned fourteen claims which are referred to as general claims, exclusive of claims by tax collectors, which are elsewhere treated, was $18,856,994.17. Of this amount of $18,856,994.17, the amount of $11,867,085.38 represents claims by Manufacturers Trust Company, as Trustee under a mortgage indenture securing an issue of First Mortgage Real Estate 6% Sinking Fund Gold Bonds, by City Bank Farmers Trust Company, as Trustee under an indenture of mortgage securing an issue of Serial 6% Gold Debentures, by the Equity Receivers of New York Investors, Inc., the holders of a bond and third mortgage (these three mortgages affected five of the seven parcels of real property of the bankrupt), by Realty Associates Securities Corporation, the holder of a blanket first mortgage on two theatre properties of the bankrupt, and by Realty Associates, Inc., the holder of two separate second mortgages on the same two theatre properties of the bankrupt. Of the remaining $6,991,909.79 of claims, $2,400,000 represents duplicated claims, $1,200,000 of which should be eliminated (these claims are made by the Equity Receivers of New York Investors, Inc., The Prudence Company, and Reconstruction Finance Corporation). The remaining $4,591,909.79 [fol. 152] represents alleged claims upon contracts of the bankrupt made by various unsecured creditors.

A number of the claims filed involved complicated questions of fact and of law, including among others, (a) the right of mortgage trustees to file claims on behalf of an entire issue of bonds or debentures of the bankrupt and in particular on behalf of otherwise unfiled bonds; (b) the

respective rights of the Equity Receivers of the New York Investors, Inc., The Prudence Company and the Reconstruction Finance Corporation to file claims upon notes of the bankrupt. The examination of these questions of law and fact involved the examination of a complicated series of inter-company transactions and the analysis of a series of agreements between said claimants with respect to a loan of twenty million dollars by the Reconstruction Finance Corporation to The Prudence Company.

7. Tax Matters.

The United States Collector of Internal Revenue filed claims on account of income taxes for the years 1930, 1931 and 1932, in the amount of $1,077,983.64, together with interest from various dates. Of this amount $527,073.77 represents duplicated claims which should be eliminated.

These claims arose out of additional tax assessments made against the bankrupt as one of a group of affiliated corporations which filed consolidated Federal income tax returns. The questions of law and fact involved in the analysis of these claims required constant conferences with the accountants not only of the bankrupt but also of many of the affiliated corporations; the obtaining of orders for [fol. 153] retention of accountants and tax consultants and special counsel with respect to the contesting or compromising of these claims. Necessarily, much time of your petitioner and of associates of your petitioner were consumed in conferences with such accountants and special counsel and in legal research as to validity of the claims.

Other services related to the preparation of tax bar orders and advising the Trustees with respect to various current tax matters growing out of the operation of the business by the Trustees, the preparation of orders for retention of accountants to examine the books and records, and consulting with and assisting such accountants in the preparation of income tax returns.

8. Examination of Officers of the Bankrupt and Other Witnesses.

The complicated affairs of the bankrupt required lengthy examinations of officers and directors of the bankrupt, and officers and directors of affiliated companies and other witnesses. Your petitioner conducted examinations of these officers and directors and other witnesses on eighteen dif-

ferent days. Moreover, it was necessary for your petitioner to attend at examinations by various creditors. The testimony so elicited is contained in four volumes numbering 1300 pages. There were also introduced into testimony 100 separate exhibits, of which 60 separate exhibits were marked as Trustees Exhibits.

In connection with these examinations and on other occasions, your petitioner investigated the past history of the affairs of the bankrupt, both in relation to the conduct of its business and the various complicated transactions with [fol. 154] affiliated corporations and in relation to the complicated inter-company accounts. In connection with these examinations and on other occasions, your petitioner investigated the transaction giving rise to the note of Ringling Bros.-Barnum & Bailey Combined Shows, Inc., and Circus City Zoological Gardens, Inc., (hereinafter referred to as the "Circus Note"), and the interest of the bankrupt therein and in the collateral held as security for said note. Your petitioner also investigated in respect to the institution of suits to recover assets for the benefit of the estate.

9. Litigation with Loew's Theatre & Realty Corporation and Loew's Incorporated.

At the date of the bankruptcy, two actions were pending on behalf of the bankrupt against Loew's Theatre & Realty Corporation and Loew's Incorporated, in the United States District Court for the Eastern District of New York. These actions were brought to recover monthly instalments of purchase price on the three theatre properties of the bankrupt, known as the Loew's Valencia, Loew's Pitkin and Loew's Kings.

The first of these actions was brought in the United States District Court for the Eastern District of New York, to recover the instalments of purchase price on the three parcels of property which became due on June 1, 1933 and to recover as well the taxes which became due on May 1, 1933. The total amount sued for in this action was $110,215.28, together with interest penalties and costs.

The second of these actions had been instituted in the Supreme Court of the State of New York for the County of [fol. 155] Kings and removed to the United States District Court. This action was brought to recover the instalments of purchase price which became due on June 1, 1933 and July 1, 1933, and to recover as well the taxes which became

liens on said properties on May 1, 1933. The total amount sued for in the second action was $168,300.56, together with interest penalties and costs.

Your petitioner caused the Trustees to be substituted as parties plaintiff in the aforesaid actions and caused themselves to be substituted as attorneys in the place and stead of Alfred T. Davison, Esq., who had commenced the actions as attorney for Allied Owners Corporation. Your petitioner continued the prosecution of these two actions.

Your petitioner, on behalf of the Trustees herein, commenced a third action against Loew's Theatre & Realty Corporation and Loew's Incorporated to recover monthly instalments of purchase price which became due on August 1st, September 1st, October 1st and November 1st, 1933, and to recover the amount of taxes which had become due thereon. The total amount sued for in this third action was $264,471.12, together with interest penalties and costs.

The pleadings alone in these actions, aside from the subsequent proceedings, constitute a considerable volume of work. In each of the actions there were four defendants, as follows: Loew's Theatre & Realty Corporation, Loew's Incorporated, Paramount Publix Corporation, and Charles D. Hilles, Charles E. Richardson and Eugene W. Leake, as Trustees in Bankruptcy of Paramount Publix Corporation.

[fol. 156] In the first two of these actions, each of the defendants served separate answers and amended answers and the defendants, Charles D. Hilles, Charles E. Richardson and Eugene W. Leake, as Trustees in Bankruptcy of Paramount Publix Corporation, served replies to the counterclaims contained in the answers of Loew's Theatre & Realty Corporation, and Loew's Incorporated, against said defendants. The plaintiffs therein, the Trustees of the bankrupt, served a reply to the counterclaims contained in the answer of the defendant, Loew's Theatre & Realty Corporation, and served a reply to the counterclaim contained in the answer of the defendant, Loew's Incorporated. In the third action, answers were served by all of the defendants.

In the first action the Trustee in Bankruptcy of Paramount Publix Corporation applied for leave to amend their answers, which application was opposed by your petitioner on behalf of the Trustees herein, and was denied by the Court.

It became necessary, as a matter of economic and efficient prosecution of these proceedings, for your petitioner to print all the pleadings. The pleadings alone in the first action are contained in two printed volumes consisting of four hundred eighty-nine (489) folios. The pleadings alone in the second action are contained in two printed volumes consisting of four hundred seventy-seven (477) folios. In connection with the first and second actions, your petitioner prepared and caused to be printed a book of exhibits of agreements, consisting of a printed volume containing six hundred sixty-six (666) folios. The complaint and annexed exhibits in the third action is contained in a printed volume consisting of seven hundred ten (710) folios. All of the foregoing has reference merely to the pleadings. [fol. 157] Many subsequent proceedings were taken in these actions including motions for leave to amend answers, motions for bills of particulars, motions for a transfer of the actions from the law calendar to the equity calendar of the Court, which last mentioned motion was successfully opposed by your petitioner on behalf of the Trustees. Your petitioner also obtained an order from the Court granting preference in the trial of these actions over the strenuous objection of the defendants. Largely, as a result of such preference, your petitioner was enabled to effect the settlement with the defendants, which is hereafter more particularly described, many months in advance at the time when such settlement might ordinarily have been effected.

Many complicated questions of law and fact arose in connection with these actions and the defenses interposed, including the somewhat novel defense of prospective failure of consideration. The preparation for trial of these actions involved intensive work, not only during regular office hours, but also at night and on Sundays and holidays. Exhaustive legal research was required in the preparation of a trial brief which approximated 100 pages of citations of law, in particular with respect to the novel defense of prospective failure of consideration and its availability to a defendant in an action involving instalment sales of real estate.

The complicated nature of the questions of law and fact involved in the preparation for trial of these actions is

clearly indicated from a recital of some of the principal defenses asserted by Loew's Theatre & Realty Corporation and Loew's Incorporated, which were as follows:

[fol. 158] (a) That there was a present and prospective failure of consideration for the agreements entered into by Loew's Theatre & Realty Corporation, Loew's Incorporated on the one hand, and Paramount Publix Corporation on the other, on November 15, 1927, by reason of the bankrupt's alleged insolvency and by reason of the bankruptcy of Allied Owners Corporation, and by reason of the defaults of Paramount under its agreements with the bankrupt, with respect to the four theatres, rights and obligations as to which had not been assigned to Loew's Theatre & Realty Corporation.

(b) That there was a present and prospective failure of consideration by reason of the bankruptcy of Paramount.

(c) That the rights of the bankrupt, if any, were derived through Paramount, and that therefore the bankrupt and its Trustees in Bankruptcy were subject to the same defenses as might be asserted against Paramount.

(d) That the bankrupt had defaulted in the payment of interest on the mortgages secured by said three parcels of property, and the bankrupt had been rendered unable to comply with its agreements to pay interest on mortgages and to reduce annually the principal thereof, and that by reason of these defaults of the bankrupt, there was a present and prospective failure of consideration for the agreement by Loew's Theatre & Realty Corporation to pay the instalments.

[fol. 159] (e) That the bankruptcy of Allied Owners Corporation constituted an anticipatory repudiation of its agreements to convey title to the three theatre parcels to Loew's Theatre & Realty Corporation.

(f) That the agreements dated November 15, 1927 between Loew's Incorporated, on the one hand, and Paramount, on the other hand, were entered into in consideration of an agreement whereby a subsidiary of Paramount was to exhibit and pay for a certain number of motion pictures produced by subsidiaries of Loew's Incorporated for exhibition by Paramount and/or its subsidiaries, and that by reason of the failure and refusal of Paramount and its

subsidiaries to perform the terms of the said agreement, and by reason of their refusal and failure to pay for motion pictures and by reason of the bankruptcy of Paramount, there had been a breach of the agreements of November 15, 1927.

(g) That the guaranty by Loew's Incorporated to Paramount was intended to be personal to Paramount and not assignable.

(h) That the assignment of the Loew's Incorporated guaranty from Paramount to the bankrupt was in fraud of the creditors of Paramount, of which Loew's Incorporated claimed to be one, and that such assignment constituted a preference.

In connection with these principal defenses and in preparation for the trial of these actions, your petitioner was [fol. 160] required to engage in intensive legal research concerning many problems of law and fact, including, among others:

(a) The nature of the defense of present failure of consideration and the nature of the novel defense of prospective failure of consideration,

(b) The rights of the bankrupt and its Trustees in Bankruptcy as third party beneficiary under the contracts between Loew's Theatre & Realty Corporation, Loew's Incorporated, and Paramount, as distinguished from the rights of the bankrupt under the actual assignment of the Loew's Incorporated guaranty.

(c) The rights of the plaintiffs, as assignee of the Loew's Incorporated guaranty.

(d) The position of the plaintiffs, as assignee of a guaranty of an obligation without an assignment of the principal obligation.

After the pleadings referred to above had finally all been served, your petitioner noticed the action for the December term, realizing that with the pressure which was being exerted by Manufacturers Trust Company, as Trustee, it was important that these actions against Loew's should be brought to trial as promptly as possible if the Trustees were to be successful in their endeavor to save this asset

for the estate generally and prevent the threatened foreclosure by the Trustee under the first mortgage indenture. Accordingly, after the case was noticed for trial, motions for preference were made and these motions were granted. [fol. 161] The case was set for trial for December 20th. The pressure which had thus been exerted resulted in the suggestion of conference with eminent counsel for Loew's, the Honorable Joseph M. Proskauer, who had been retained specially for the defense of this action.

During this period the committee which had been formed to represent the First Mortgage bondholders became extremely active, and your petitioner undertook further negotiations with their counsel, Messrs. Sullivan & Cromwell, to persuade them that by cooperation with the petitioner and the Trustees in Bankruptcy it might be possible to develop an adjustment of the Loew claim upon a sufficiently satisfactory basis to justify a serious consideration of a reorganization of the bankrupt under some plan which would insure eventual payment in full to the First Mortgage bondholders, the debenture note holders and the unsecured creditors as well.

Accordingly your petitioner communicated, as well, with the counsel for the debenture note holders committee, Messrs. Chadbourne, Hunt, Jaeckel & Brown, and enlisted their aid in persuading the First Mortgage Bondholders Committee that cooperation would be the better course.

To strengthen the advantages of the program which the Trustees and your petitioner then advanced, your petitioner impressed upon counsel for the First Mortgage Bondholders Committee that the first mortgage indenture did not cover the guaranty which had been given by Loew's to Paramount prior to the bankruptcy, and which had been assigned by Paramount to the bankrupt as a consideration for an extension of time for the payment of instalments [fol. 162] in May, 1932. Numerous conferences with the attorneys for the First Mortgage Bondholders Committee ensued, as a result of which your petitioner persuaded them finally that a very serious legal doubt existed as to whether the foreclosure of the first mortgage carried with it the right to enforce the guaranty of Loew's which was the all-important protection to the eventual owner of the three theatre properties which Loew's acquired from Paramount. In order to further develop the importance of this guaranty

as the most substantial asset in the whole picture, your petitioner thoroughly briefed the legal questions involved, and finally, after conference and careful consideration with the Trustees and with their approval advised the attorneys for the First Mortgage Bondholders that if the First Mortgage Bondholders did not succeed in persuading the mortgage indenture trustee to desist in its determined efforts to foreclose the mortgage for the benefit of the First Mortgage Bondholders, which would have resulted in wiping out, in the opinion of the Trustees and your petitioner, all junior creditors' interests in these substantial assets, the Trustees and your petitioner would negotiate directly with Loew's and endeavor to sell the guaranty to Loew's for a substantial price in the interests of the junior lienors and unsecured creditors.

As a matter of fact, your petitioner actually prepared motion papers praying for authority to sell the said guaranty for the benefit of the bankrupt estate.

As a result of the procedure adopted above, your petitioner succeeded in enlisting the aid of counsel for the First Mortgage Bondholders Committee at least tentatively, and invited them to the numerous conferences which then en- [fol. 163] sued between your petitioner, some of the Trustees, the attorneys for the Trustee of the mortgage indenture and the attorney for and special counsel to Loew's. These conferences proceeded almost daily for several weeks and as it became apparent that there were possibilities of an adjustment of the Loew's controversy, which would be beneficial to the estate generally, the trial of the actions against Loew's were adjourned from time to time during the months of December, January and February. In order to most effectually accomplish the purposes suggested above, the cases were held ready on the calendar from time to time, thus indicating to Loew's the readiness and willingness of the Trustees on the advice of your petitioner to proceed at any time with the trial of the actions.

It was necessary, of course, to support the position which your petitioner had taken that the Trustees would try out the issues involved in the Loew's actions if it became necessary to do so without delay, and to that end more than thirty separate days and nights were consumed in a most thorough preparation of an exhaustive trial brief covering all of the questions involved, including a careful analysis

of all of the instruments involved in the Loew controversy. The preparation of this trial brief involved for the period stated above a large part of the time of one member of your petitioner's firm and two associate counsel in its advice, and covered the examination of many hundreds of reported cases, the consideration of various theories of law involved in the pleadings and many drafts and re-drafts of the trial brief itself. When completed the trial brief covered approximately 100 pages. In connection therewith [fol. 164] witnesses including officers and employees of the bankrupt were examined and thoroughly prepared for the trial of the action. In this connection your petitioner also thoroughly reconsidered all of the testimony of various officers and employees of Loew's, which had been adduced in the examinations under Section 21-a of the Bankruptcy Act before the Learned Referee.

In preparation for the trial, subpoenas were obtained, many of them were served and copies of voluminous documents were prepared for use upon the trial, both for Court and counsel.

The conferences above mentioned with the Trustees and counsel and with the witnesses proceeded simultaneously with the preparation of the trial brief, the preparation of witnesses and all other preparations generally, looking to the trial of the action, if such trial became necessary. As the conferences proceeded it became more and more evident to the committees for the bondholders and for the debenture holders that a satisfactory settlement of the Loew's controversy would make possible a reorganization of the bankrupt corporation with the results which had been predicted, and as this result became more manifest, the cooperation of the committees became fuller and more effective. Eventually in March, 1934, the conferences proceeded to the point where it was possible to draft a tentative stipulation looking to a settlement of the Loew's actions, and thereupon new important questions of law arose, viz: the determination of the appropriate procedure through which it would be possible to work out the Loew's settlement, if the terms were eventually agreed upon, so that good and [fol. 165] marketable title to the properties could be conveyed to Loew's or Loew's nominee. This involved exhaustive research upon the question of the sale of the properties free of lien, as a method whereby the good and mar-

ketable title which Loew's demanded could in fact be given.

Alternative methods were suggested and considered and this involved additional research. After such exhaustive research and further conferences with the attorneys and counsel for Loew's and also conferences with the Trustees of the estate and the attorneys for the First Mortgage Committee, the absence of unanimity of opinion on the method of procedure developed further arguments supporting the theory which the Trustees and your petitioner had first entertained, several months before, viz: modification of the Loew's agreements to be approved in reorganization proceedings.

Accordingly, your petitioner and the Trustees then pressed forcibly the reorganization method as the most expedient and satisfactory solution of the problem, and after further conferences with the Trustees and the parties named above, it was generally agreed that this method should be adopted. With this understanding, your petitioner proceeded to prepare, in May, a first draft of a proposed modification of the Loew's agreements, which should form the basis of the contemplated reorganization proceedings. Thereafter the draft was submitted to the Trustees, the attorneys for Loew's the attorneys for the First Mortgage Committee and the Debenture Committee, and conferences ensued almost from day to day in the consideration of the original draft and the preparation of numerous subsequent drafts throughout the months of May and June. [fol. 166] Because of the numerous questions which were raised, the complicated legal problems involved and the number of parties concerned, there were upwards of ten redrafts of the proposed modification agreement prepared prior to the date when the petition for reorganization of the bankrupt under Section 77B of the Bankruptcy Act was filed by the bankrupt corporation.

In connection with the preparation of these drafts, looking to the Loew's settlement, in reorganization proceedings, it became apparent that there were very serious tax problems involved. Accordingly, the Trustees authorized application by your petitioner to the Court for the appointment of special tax counsel resident in Washington, D. C. with whom to advise and consult concerning those phases of the problem. Thereafter numerous conferences were held with said tax counsel, and as a result thereof a sub-

stantial modification of the plan of adjustment was evolved which substituted a contract of sale for the proposed present sale and purchase money mortgage. This involved considerable reconstruction of the plan which had been developed up to that time and numerous changes in the proposed agreement. It involved also the necessity of the consideration of the exceptions to title which were enumerated in the reports of the Title Guarantee & Trust Company issued at the time that the mortgage indenture was originally placed against the properties, and the obtaining of continuation searches, conferences with the representatives and counsel for Title Guarantee & Trust Company, and preparation of special "exception clauses" in connection with the so-called contract of sale.

[fol. 167] Your petitioner has outlined fairly substantially the development of the Loew controversy, the litigation and the negotiations in connection therewith up to the date of the filing of the petition under Section 77B of the Bankruptcy Act, because of the fact that the Loew's settlement has eventually developed, through the many months of arduous work in the preparation for trial and the subsequent negotiations, as the keystone upon which the entire plan of reorganization of the bankrupt corporation rests. It is common knowledge that such reorganization is well on its way to completion, that there is practical agreement through the efforts of your petitioner in daily conference during the past two months with all of the parties who have intervened in the 77B proceedings and who have appeared before the Hon. Oscar A. Lewis as Special Master, and that in all probability such plan will come before the Court for confirmation in the course of the next four or five weeks.

The magnitude and importance of this matter will become apparent when we state that at the time that the original breach of the Loew agreements occurred in June, 1933, the unpaid balance of instalments on the three theatre contracts was approximately $10,800,000. Under the Loew's settlement as proposed, the aggregate amount payable will be $12,875,000, guaranteed by Loew's Incorporated, the parent corporation which has a capital surplus of approximately $80,000,000. Under the new arrangement, taxes are payable by Loew's as they were under the old agreements.

The settlement of the Loew controversy made possible the adjustment of the next important asset of the estate in magnitude, namely, the claim against Paramount, and it is generally known that practical agreement has been reached [fol. 168] between the Trustees of this estate and the Trustees of Paramount for the settlement of that claim also. These settlements have been so successfully negotiated that all of the creditors of the estate, of whatever class, are now of the confirmed opinion that their claims will, in order of their lien position, be eventually fully paid, and that there will even be preserved to the bankrupt itself a substantial remaining equity.

10. Claims against Paramount Publix Corporation.

On March 14, 1933, Paramount Publix Corporation (hereinafter referred to as "Paramount") was adjudicated a bankrupt in proceedings pending in the United States District Court for the Southern District of New York. Paramount failed to pay the instalments of purchase price with respect to the four theatres which had been retained by it, i.e., the Brooklyn Paramount Theatre and Office Building, Brooklyn, New York, the Paramount Theatre, Birmingham, Alabama, the Paramount Theatre, Fremont, Ohio, the Paramount Theatre, Glens Falls, New York, and thereafter failed to pay the monthly instalments as they became due.

On April 3, 1933, Allied Owners Corporation filed a proof of claim against the bankrupt estate of Paramount for breach of the agreements to purchase the theatre properties; the amount of said claim was $6,095,425.13. At the date of the commencement of the bankruptcy proceedings herein Paramount was being administered in the above-mentioned bankruptcy proceeding in the United States District Court for the Southern District of New York by three Trustees. Your petitioner prepared a proof of claim [fol. 169] against Paramount which was filed on September 14, 1933, in the amount of $23,364,726.12, on account of the breach by Paramount of the instalment contracts. Thereafter, the Trustees in Bankruptcy of Paramount filed objections to the claims of Allied Owners Corporation and of the Trustees.

These claims against Paramount involved many complicated questions of law and fact, requiring the studying and analysis of a long series of contracts with various modifica-

tions, continuous conferences with former officers and directors of the Bankrupt and intense legal research. Among others, the following legal questions required the attention and services of your Petitioner:

(a) Determination of the question of the liability of Paramount upon the contracts, rights under which had been assigned to Loew's Theatres and Realty Corporation;

(b) Determination of the question of whether the series of contracts with Paramount constituted a lease or an instalment purchase contract;

(c) The question of the voidability of the assignment of the Loew's Incorporated guaranty and the assignment of the Brooklyn Manhattan Transit lease to Allied either as preferences or as fraudulent conveyances;

(d) The question of whether the agreements between Paramount and the Bankrupt were agreements to create or assume a mortgage;

(e) Whether the execution of the agreements required the affirmative vote or written consent of the holders of two-[fol. 170] thirds of the outstanding preferred stock of Paramount as required by its certificate of incorporation;

(f) The question of whether or not the prosecution of the actions against Loew's Theatre and Realty Corporation and Loew's Incorporated was inconsistent with the proof of claim filed against Paramount, including the question of the necessity for an election by the Trustees as between the two claims or causes of action;

(g) The bankruptcy of Paramount as an anticipated breach of a purchase contract;

(h) The question of the fairness of the purchase contract and the burden of proof with respect thereto;

(i) The question of the voidability of a contract between two corporations having common directors;

(j) The question of the ratification of the contracts should they be held to be contracts to create or assume mortgages;

(k) The question of the valuing of the security held by the Trustees of the Bankrupt, i.e. the fee title to the real estate under Section 57B of the Bankruptcy Act.

A completely novel question of law which required the attention and service of your Petitioner was the proper measure of damages of instalment purchases of real property in the event of bankruptcy of the purchaser prior to [fol. 171] completion of the contracts. This question required intensive legal research and continual conferences with accountants and verification, with reference to the law, of compilations of accountants including the estimation of the probable appraised value of the fee title to four parcels of real estate.

In addition, Paramount or one or more of its various subsidiaries, had been in occupation of the four theatre properties of the Bankrupt from January 1, 1933, until later dates, varying with respect to each of the properties, for which occupation the Bankrupt had received no compensation.

Your Petitioner was required, in connection with this claim for use and occupation, to investigate and analyze the complicated corporate structure of the Paramount organization, to investigate the relationship between the particular subsidiary or subsidiaries occupying the property of the Bankrupt and the parent corporation, to investigate the receipts and disbursements of the subsidiary or subsidiaries occupying the properties and the possible liability of the subsidiary or parent corporation for such excess of receipts over proper disbursements, as well as to investigate and determine the liability of receivers in Equity and Trustees in Bankruptcy of Paramount for such use and occupation by subsidiaries under their control. Petitioner was required to make a detailed study of orders entered in the bankruptcy proceeding of Paramount contemplating a disaffirmance by the Paramount Trustees of the agreements which were alleged to be leases, as well as to study the proceedings before the Referee in the bankruptcy proceedings of Paramount with respect to an order entered in May, 1933, directing the Trustees of Paramount to ac- [fol. 172] count for certain amounts which, from the time of their appointment, they had received, and amounts which the Receivers in Equity of Paramount had theretofore received, as well as to confer with officers of the bankrupt as to any amounts received under the said orders.

The magnitude of the claim of the Bankrupt Estate against Paramount, which constituted one of the largest

single assets of the estate of the bankrupt herein and the largest single individual creditor claim against Paramount, required attorneys connected with your Petitioner to constantly investigate contemplated proceedings in connection with the bankruptcy proceeding of Paramount, including proposed reorganization of many of its subsidiaries and affiliates comprised in the corporate structure of the Paramount organization which, as before stated, consisted of several hundred separate corporations.

11. Litigation with Mortgagees.

Five of the theatre properties of the bankrupt, that is, Brooklyn Paramount Theatre and office building, Brooklyn, New York; Paramount Theatre, Birmingham, Alabama; Loew's Kings Theatre, Brooklyn, New York; Loew's Pitkin Theatre, Brooklyn, New York; Loew's Valencia Theatre, Jamaica, New York, were subject to two mortgage liens. The first of these consisted of an indenture of mortgage to Manufacturers Trust Company, as Trustee, dated as of July 1, 1927, securing an issue of First Mortgage Real Estate 6% Sinking Fund Gold Bonds. At the date of the bankruptcy of the entire issue of these bonds there was outstanding, including $100,500 of bonds held in the treasury of the bankrupt, a total of $9,127,500. The [fol. 173] second lien was an indenture of mortgage to the Bank of America, as Trustee, which was succeeded by City Bank Farmers Trust Company, as Trustee, dated as of July 1, 1927 and securing an issue of Serial 6% Gold Debentures. At the date of the bankruptcy, the amount of these debentures outstanding, including $1,500 of debentures held in the treasury of the bankrupt, was $1,750,000.

The other two properties of the bankrupt, that is, Paramount Theatre, Glens Falls, New York, and Paramount Theatre, Fremont, Ohio, were subject to a blanket first mortgage owned by Realty Associates Securities Corporation, upon which, at the date of the bankruptcy, there remained unpaid the amount of $238,000 with interest. In addition, each of the two aforesaid properties was subject to a second mortgage, each second mortgage being in the amount of $25,000 upon which there was unpaid, at the date of the bankruptcy, the entire amount plus accrued interest.

Shortly after the commencement of the bankruptcy proceedings, the Manufacturers Trust Company, as Trustee

under the first mortgage indenture above referred to, applied for a segregation of rents, profits and income arising from the five theatre properties. Your petitioner was required to attend protracted hearings with reference to the segregation order and to attend hearings before Referee Theodore Stitt, acting as Special Master. Your petitioner was also required to attend at court on the hearing of various motions and to engage in extended conferences with the attorneys for the Manufacturers Trust Company until a segregation order in the proper form was finally entered. [fol. 174] Thereafter Manufacturers Trust Company, as Trustee, made an application for leave to foreclose the mortgage. Your petitioner was required to strenuously oppose this application and was required to attend many conferences and to attend at court on hearings until an order in the proper form was finally granted to Manufacturers Trust Company. Thereafter the foreclosure action was commenced and your petitioner was required to defend the same. The services in this connection involved, among others, the service of an answer, the investigation of defenses, the study of the Mortgage Moratorium Laws of the State of New York, their application in a mortgage foreclosure proceeding commenced in the United States District Court for the Eastern District of New York, and the investigation of other defenses to said action. Manufacturers Trust Company served a reply in said action, but before any further proceedings were taken, the bankrupt filed its petition under Section 77B of the Bankruptcy Act.

In connection with this litigation with the Manufacturers Trust Company, your petitioner was required to investigate and to study many complicated questions of law and fact, including, among others, the question of whether or not the Loew's, Incorporated, guaranty which had been assigned by Paramount to the Bankrupt was subject to the lien of the first mortgage; the value of the Loew's, Incorporated guaranty to the unsecured creditors, separate and distinct from the other obligations of Loew's Theatre & Realty Corporation and Loew's Incorporated, under the assumption of the agreements; the application of the theory of third party beneficiaries contracts to the actions against Loew's Theatre & Realty Corporation and Loew's Incorporated, [fol. 175] the availability to Loew's Theatre & Realty Corporation and Loew's Incorporated of the defense of present failure of consideration in the event of the commencement

of a foreclosure action by Manufacturers Trust Company.

The chief result obtained through the litigation with Manufacturers Trust Company was the enabling of the Trustees to continue the prosecution of the actions against Loew's Theatre & Realty Corporation and Loew's Incorporated for the benefit of all creditors of the bankrupt, both secured and unsecured. The order granted to Manufacturers Trust Company permitting it to foreclose the mortgage specifically provided that Loew's Theatre & Realty Corporation and Loew's Incorporated should not be named as parties defendant.

In connection with this litigation with Manufacturers Trust Company, your petitioner was required to apply for authority to the Trustees to sell the choses in action against Loew's Theatre & Realty Corporation and Loew's Incorporated for the benefit of the estate free of any mortgage or lien. This proceeding, however, was discontinued after the creditors of the bankrupt had been protected in the foreclosure of the mortgage by Manufacturers Trust Company, as previously recited.

To summarize this phase of the services rendered by your petitioner, we believe it is fair to state that the results obtained in the proceedings last mentioned, weakened materially the most substantial defense of Loew's, and thereby became a most influential factor and instrumentality of the reorganization now in process of completion, which will eventually result in full payment of all claims of creditors of every class.

[fol. 176] In connection with the mortgages covering the Glens Falls and Fremont properties, your petitioner was required to engage in considerable litigation with the mortgagees. Realty Associates, Inc., the holder of the two second mortgages on these properties, made an application for an order of segregation of rents, issues and profits. This application was referred to Theodore Stitt, Esq., as Special Master. Your petitioner was required to attend at several hearings before the Special Master and upon the confirmation of the report of the Special Master. In connection with this motion, your petitioner was required to investigate in particular the question of whether or not a mortgagee was entitled to a segregation from the date of bankruptcy or from the date of the application for such segregation. Your petitioner was required to investigate in this connection, not only the law of the State of New York, but also the

law of the State of Ohio. Your petitioner was also required to attend many conferences with the attorneys for Realty Associates, Inc. and engaged in considerable controversy with respect to the proper form of segregation order to be entered. An order of segregation in the proper form was finally entered on this application. In this connection, legal memoranda were prepared and submitted to the Special Master and the Court.

Thereafter, Realty Associates Inc. made an application to foreclose the mortgages held by it on the said two theatre properties. In connection with this application, your petitioner was required to prepare memoranda of law and attend many conferences with the attorneys for Realty Associates Inc. Thereafter, an order in the proper form was [fol. 177] granted to Realty Associates Inc. allowing it to foreclose its mortgages.

In connection with this litigation with Realty Associates Inc., your petitioner was required to investigate questions of law and fact, including, among others, the effect of such mortgage foreclosure upon the claims filed by the Trustees against Paramount and the availability of such foreclosure proceedings as a defense to the claim against Paramount. The order granting leave to Realty Associates Inc. to foreclose its mortgages as finally entered, contained, in your petitioner's opinion, provisions effectual to protect the rights of the unsecured creditors of the Bankrupt in the claims against Paramount.

12. Litigation with former Attorney for Bankrupt.

Alfred T. Davison, Esq., an attorney, had been retained by the Bankrupt in connection with litigation against Loew's Theatre & Realty Corporation and Loew's, Incorporated, and in connection with the claim filed by the Bankrupt against Paramount. Shortly after the commencement of the bankruptcy proceedings herein, Mr. Davison made an application for payment to him of $15,000 in fees, less the initial payment of $5,000 previously paid to him. This application was referred to a Special Master. After the introduction of expert testimony by the claimant before the Special Master, it appeared that the question of the value of the services rendered would be a most important issue and accordingly application was made to the Court for leave to employ eminent counsel to testify as an expert. The Judge to whom the application was presented required per-

[fol. 178] sonal conference with counsel and, after such conference, decided that the Special Master was eminently qualified to determine the reasonable value of the services and that the estate should not incur the cost of expert's fees, it appearing that the expert whom the Trustees had selected would require the payment of not less than $500 for consideration of the record and for preparation and testifying.

During the course of the proceeding before the Special Master, Mr. Davison applied to the Court for leave to enlarge his original claim of $15,000 to $20,000. This application was strenuously opposed by your petitioner and, after argument and the submission of memoranda, the application was withdrawn.

Hearings before the Special Master then proceeded. The application of Mr. Davison asked for an allowance of fees for an expert witness. This claim was vigorously opposed. After examination and cross examination of all witnesses, the Special Master rendered a lengthy report. This report found that Mr. Davison had a retaining lien for the amount claimed by him for the value of his services, and that the Court should direct the Trustees in bankruptcy to pay to him the sum of $10,000 plus his disbursements, including the fees of his expert witness.

Upon the motion to confirm this report, your petitioner did not oppose the finding that Mr. Davison had a retaining lien, but did vigorously oppose the fees of the expert. The Court rendered a decision however, in which it raised the issue of whether the books, records and documents upon which Mr. Davison had a lien had any value, as such, to the [fol. 179] estate of the bankrupt, and held that if the records in his possession were worth less than the amount of his allowed claim "he cannot recover the full amount of his lien in this bankruptcy proceeding, but he would be a general creditor for the balance." The Court held further that "there were insufficient facts before the Court to determine the value to the estate of the books, records, documents, etc., upon which Mr. Davison has a lien," and referred this question back to the Referee to hear and report with his opinion.

From this Order Mr. Davison took an appeal. The Circuit Court affirmed the Order because it found the Order appealed from was interlocutory and stated that for that reason it was "unable to direct the lower Court to order

payment of this lien." It indicated, however, so clearly that it believed that the appellant had surrendered the papers and records of the bankrupt estate, relying upon the belief that he would be fully paid the amount of the value of his services when determined, and had thereby received the Court's protection under a stipulation, that he should, in fact, be paid out of the estate. The Circuit Court also affirmed that part of the Order which disallowed the expert witness's fees as costs, thereby sustaining your petitioner's contention.

Upon again presenting the matter to the bankruptcy court, the Court stated that upon reading the Circuit *Court* Court's opinion, it believed that the Circuit Court had indicated that Mr. Davison should be paid out of the general assets of the estate and, accordingly, directed your petitioner to enter an Order for such payment.

[fol. 180] In connection with this litigation your petitioner was required to examine into the law and facts involved, to prepare memoranda of law, petitions and orders, and to prepare and file a brief upon appeal to the Circuit Court of Appeals for the Second Circuit. A great deal of time was necessarily involved in the examination of the incident legal questions, including, among others, the survival in bankruptcy of a lien for legal services, the nature of an attorney's lien, and the question of whether Mr. Davison had a retaining or a charging lien, or both. Your petitioner was required to attend hearings before the Special Master on several days, and also required to argue before the Circuit Court of Appeals for the Second Circuit upon the appeal taken by Mr. Davison.

13. Claims Against New York Investors, Inc.

At the date of the commencement of the bankruptcy proceeding herein, New York Investors, Inc., the parent corporation of the bankrupt and the owner of all its stock, was being administered by Clifford S. Kelsey and Charles H. Kelby, Equity Receivers appointed by the District Court of the United States for the Eastern District of New York in the matter pending in that Court entitled "John A. Selby, Plaintiff, against New York Investors, Inc., Defendant". On October 11, 1933, your petitioner, as coun-

sel to the Trustees in Bankruptcy herein, filed a claim in the aforementioned proceeding against New York Investors, Inc. in the amount of $2,632,144.05. Thereafter and on December 11, 1933, your petitioner, as counsel for the Trustees in Bankruptcy herein, filed a claim in the same [fol. 181] proceeding in the amount of $527,193.84. These claims are based upon various transactions between the bankrupt and New York Investors, Inc. and various transactions with other parties in which the bankrupt engaged at the instance of New York Investors, Inc. The claims embraced the following items:

(1) Loss on payments of securities by the bankrupt, repayment of which was guaranteed by New York Investors, Inc.	$1,562,444.10
(2) Alleged share of income taxes paid to New York Investors, Inc. by the bankrupt	64,739.96
(3) Money unpaid to the bankrupt by reason of the acquisition of a note or notes and/or the loan or loans to Circus City Zoological Gardens, Inc. and American Circus Corporation, John Ringling, Ringling Bros.-Barnum & Bailey Combined Shows, Inc., repayment of which was guaranteed by New York Investors, Inc. to the bankrupt	828,131.77
(4) Overpayment on purchase of securities by bankrupt from New York Investors, Inc.	176,828.22
(5) Moneys unpaid to the bankrupt on account of notes of employees of New York Investors, Inc. and affiliated companies	107,957.28
[fol. 182] (6) Loss on Savings Plan Certificates held by the bankrupt	92,221.34
(7) Alleged share of franchise taxes paid to New York Investors, Inc. by the bankrupt	27,035.22
(8) On account of a dividend by the bankrupt to New York Investors, Inc. on or about December 31, 1929	300,000.00
Total	$3,159,337.89

Your petitioner was required to conduct many investigations of various officers and directors of the bankrupt and of officers and directors of New York Investors, Inc. in order to determine the existence of these claims. The claims arise out of many complicated inter-company transactions by the bankrupt with New York Investors, Inc. and with the other corporations formerly affiliated with the bankrupt. It is obvious that claims of this magnitude required the careful consideration and attention of the books and records not only of the bankrupt but of New York Investors, Inc., the corporations formerly affiliated with the bankrupt, as well as the examination and research and investigation of a complicated series of agreements between the bankrupt, New York Investors, Inc., Circus City Zoological Gardens, Inc., John Ringling, Ringling Bros.-Barnum & Bailey Combined Shows, Inc., and other parties, including the Manufacturers Trust Company and other banks and trust companies. Many conferences were had with the Trustees in the preparation of these claims.
[fol. 183] Among the problems of law and fact involved in these claims, your petitioner performed services requiring:

(a) Careful consideration and examination of consolidated Federal income tax returns which had been filed by the bankrupt as one of the group of affiliated corporations;

(b) The share of tax liability properly allocable to the bankrupt;

(c) The circumstances of the purchase of securities by the bankrupt from New York Investors, Inc. and The Prudence Company;

(d) The circumstances under which loans were made by the bankrupt to various employees of New York Investors, Inc. and affiliated corporations;

(e) The circumstances of the acceptance by the bankrupt of Savings Plan Certificates of New York Investors, Inc. on account of the payment of certain notes of employees of New York Investors, Inc. and other affiliated corporations;

(f) The investigation of accountants' reports with respect to the value of the capital stock of the bankrupt at the time of the declaration of the dividend which was paid

to New York Investors, Inc. (This last mentioned problem involved the consideration and study of various methods of valuing the capital stock of a corporation whose [fol. 184] principal asset was an interest as vendor under instalment purchase contracts.)

An additional problem involved was the circumstances and the transactions resulting in the note of Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and Circus City Zoological Gardens, Inc. in the amount of $1,117,320.67, in which the interest of the bankrupt was $828,131.77, The individual problems involved in the Circus Note are more particularly set out in succeeding paragraphs.

14. Miscellaneous Actions Upon Notes.

Included among the assets of the bankruptcy estate were six notes of individuals upon which the amount of $107,937.28 remained unpaid. There was held by the bankrupt various stocks and bonds as collateral security for the payment of the said notes. After unsuccessful attempts to collect the same, your petitioner, as counsel to the Trustees in Bankruptcy herein, commenced six actions against the makers of said notes, as follows:

1. An action in the Supreme Court of the State of New York, County of Kings, entitled "Percival B. Jackson, et al., plaintiffs, against Charles A. Chase, defendant", for the sum of $22,088.37, with interest.

2. An action in the Supreme Court of the State of New York, County of Kings, entitled "Percival E. Jackson, et al., plaintiffs, against Frederick Joerissen, defendant", for the sum of $15,800, with interest.

[fol. 185] 3. An action in the Supreme Court of the State of New York, County of Kings, entitled "Percival E. Jackson, et al., plaintiffs against Clemens F. Schmitz, defendant," for the sum of $29,699.94, with interest.

4. An action in the Municipal Court of the City of New York, Borough of Brooklyn, First District, entitled "Percival E. Jackson, et al., plaintiffs, against Thomas H. Long, defendant", for the sum of $407.63, with interest.

5. An action in the City Court of the City of New York, County of Kings, entitled "Percival E. Jackson, et al.,

plaintiffs, against Theresa Mahoney, defendant", for the sum of $2,759.13, with interest.

6. An action in the Supreme Court of the State of New York, County of Kings, entitled "Percival E. Jackson, et al., plaintiffs, against Francis T. Pender, defendant", for the sum of $36,517.94, with interest.

Thereafter, your petitioner, as counsel to the Trustees in Bankruptcy herein, entered judgments in the full amount in actions No. 1 and 2. The defendants, in actions No. 3, 4 and 5, made offers of compromise, and your petitioner was required to confer at various times with said defendants and their attorneys in connection with the proposed compromise (the compromises of these three actions were later effected in the proceeding under Section 77B upon the bases negotiated by your petitioner).

In action No. 6, the defendant interposed various defenses and counterclaims and this action was being prose-
[fol. 186] cuted by your petitioner at the time the bankrupt filed its petition under Section 77B of the Bankruptcy Act. The aforementioned actions required the services of your petitioner in the preparation of summonses and complaints, the study of answers, the preparation of judgments, the investigation of the books of account of the bankrupt, the examination of the defendants in the bankruptcy proceeding.

In connection with these actions your petitioner was required to consider problems of law and of fact including, among others, the question of the effect of the bringing of these actions upon the claims of the Trustees in Bankruptcy herein against the equity receivership estate of New York Investors, Inc., the validity of counterclaims interposed by the defendants based upon bonds of the Debtor, and defenses based upon various alleged agreements of the bankrupt for compensation for personal services. In addition, considerable time of attorneys connected with your petitioner was necessarily spent in conferences with the defendants and their attorneys in effecting compromises of the actions.

Your petitioner was required, in connection with these actions, to draw many drafts of stipulations of settlement, and to confer with the defendants and their attorneys with reference to these stipulations.

Many of the defendants requested extensions of time to file pleadings and your petitioner prepared the necessary stipulations.

In connection with the settlement of these actions, your petitioner examined the collateral held by the bankrupt estate for the payment of each note and obtained data as to the value of each article of collateral, and determined the [fol. 187] effect of the value of the collateral upon the proposed sale of the collateral and upon the proposed compromises.

In connection with the counterclaims interposed by the defendants upon the First Mortgage Real Estate 6% Sinking Fund Gold Bonds which had been issued by the bankrupt, your petitioner necessarily examined the law with reference to the acquisition of claims against a bankrupt and the probable effect of an adjudication that the bankrupt was insolvent upon these counterclaims upon bonds of the bankrupt.

15. The Note Made by Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and Circus City Zoological Gardens, Inc. the Collateral held therefor and the Interest of the Bankrupt in the Note and in the Collateral.

Among the assets of the bankruptcy estate was a note made by Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and Circus City Zoological Gardens, Inc. to the order of the bankrupt in the sum of $1,117,320.67. By the note the makers promised jointly and severally to pay to the bankrupt at the office of the Central Hanover Bank & Trust Company, in the City of New York, the sum of $1,117,320.67 with interest at 6% per annum from December 6, 1931, on or before November 6, 1937. The interest was payable on the 26th days of May and November in each year. At the commencement of the bankruptcy proceedings herein, the interest had been paid on the preceding May 26th.. The note, by its terms, was to be amortized by payment on account of principal of 33⅓% of the net earnings during 1932 of Ringling Bros.-Barnum & Bailey Com- [fol. 188] bined Shows, Inc., including therein the net earnings of certain partnerships from January 1, 1932, and 50% of its net earnings in each year thereafter, and to be further reduced by the application of all the net earnings of the Circus City Zoological Gardens, Inc. There was a

provision in the note for the determination of the net earnings after providing for winter quarters expense, renewal expense, taxes and an amount for working capital for the first weeks of the ensuing season.

The services rendered by your petitioner to the Trustees in Bankruptcy herein in investigation of the facts and transactions connected with this note (hereafter called the "Circus note"), in advising the Trustees with respect to the rights of the bankrupt to collateral held as security for the payment of the note and with respect to legal proceedings in connection with the Circus note and the rights of the Trustees in Bankruptcy in the note and in the collateral, consumed much time of attorneys connected with your petitioner, and were many and varied. They necessarily involved several hundred hours in the aggregate. The Circus note and the cash in banks constituted practically the only free assets of the bankruptcy estate, that is, assets which were not pledged or mortgaged in some manner. Although the face amount of the note was $1,117,320.67, after lengthy investigation by your petitioner, the interest of the bankrupt in said note was determined to be the sum of $828,131.77.

A brief statement of some of the transactions giving rise to the note and the interest of the bankrupt therein is essential in order that the complications involved in the [fol. 189] investigation of the facts, the rendering of reports to the Trustees and the advising of the Trustees in connection therewith, may be intelligently stated.

In the year 1929 John Ringling (the senior member and active partner of Ringling Bros.-Barnum & Bailey Circus, then a partnership), was desirous of purchasing the Circus City Zoological Gardens, Inc. and American Circus Corporation, and a number of other Circus companies. He endeavored to obtain a loan of the necessary funds. New York Investors, Inc., the owner of all the outstanding common capital stock of the bankrupt, for a consideration, arranged the loan: it endorsed a note made by John Ringling on September 6, 1929 in the amount of $1,700,000. This note, after being endorsed by New York Investors, Inc., was discounted by John Ringling with the Central Hanover Bank & Trust Company.

In August, 1930, the bankrupt purchased the note from the Central Hanover Bank & Trust Company for $1,700,000

plus accrued interest. Thereafter certain payments of interest and in reduction of the principal of the note were made to the bankrupt and to groups of other persons comprising a syndicate under a syndicate agreement, dated September 17, 1929, under which New York Investors, Inc. was syndicate manager, and which syndicate participants had interests in the note by virtue of their syndicate participations.

In July, 1932 a new set-up of obligation was arrived at, at which time the Circus note above referred to was made by Ringling Bros.-Barnum & Bailey Combined Shows, Inc. [fol. 190] and Circus City Zoological Gardens, Inc. to the order of the bankrupt in the amount of $1,117,320.67. John Ringling individually endorsed the last mentioned note. The payment of the last mentioned note was secured by the pledge of collateral including stocks, bonds, mortgages, paintings and works of art, certificates of deposit in banks, reversionary interests in stocks, bonds and other securities including paintings theretofore pledged to other persons. A printed list of the collateral so received alone comprises 12 pages of closely printed matter.

In connection with the interest of the bankrupt in the said Circus note, your petitioner was required to study, analyze and engage in intensive legal research with respect to more than 20 individual printed contracts comprising more than 250 printed pages including, among others:

a. A certificate of incorporation of Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

b. A voting trust certificate for capital stock of Circus City Zoological Gardens, Inc. issued to New York Investors, Inc.

c. A voting trust certificate for capital stock of Circus City Zoological Gardens, Inc. issued to John Ringling.

d. A voting trust agreement entered into by the stockholders of Circus City Zoological Gardens, Inc., John Ringling, John M. Kelley, Samuel W. Gumpertz, William M. Greve and Francis T. Pender, as voting trustees.

[fol. 191] e. An agreement between John Ringling and New York Investors, Inc., dated September 6, 1929.

f. A voting trust agreement between the stockholders of American Circus Corporation and Circus City Zoological

Gardens, Inc. and William M. Greve and John Ringling, as voting trustees, dated September 6, 1929.

g. An agreement between New York Investors, Inc. and John Ringling, dated September 6, 1930.

h. A voting trust certificate for common stock of Ringling Bros.-Barnum & Bailey Combined Shows, Inc. issued to John Ringling.

i. A voting trust certificate for common stock of Ringling Bros.-Barnum & Bailey Combined Shows, Inc. issued to New York Investors, Inc.

j. A bill of sale from John Ringling to Rembrandt Corporation, dated July 25, 1932, of pictures and works of art.

k. An agreement between John Ringling and New York Investors, Inc., dated July 25, 1932.

l. A certificate of incorporation of Rembrandt Corporation.

m. An agreement between Rembrandt Corporation and John and Mabel Ringling, Inc., dated July 25, 1932.

[fol. 192] n. Articles of reorganization of Circus City Zoological Gardens, Inc.

o. A joint venture agreement between various subscribers to a syndicate and New York Investors, Inc., with respect to the stock of American Circus Corporation.

p. An agreement terminating a voting trust agreement with respect to Circus City Zoological Gardens, Inc., dated September 11, 1932.

q. An agreement between John Ringling and New York Investors, Inc. and Allied Owners Corporation and Manufacturers Trust Company and Resource Holding Corporation, dated September 20, 1932.

Your petitioner, in addition, was required to study and analyze a large volume of correspondence between the parties to the aforesaid contracts and between New York Investors, Inc. and the Interstate Commerce Commission. A very large portion of the testimony adduced by your petitioner in examinations of officers and directors of the bankrupt and other witnesses, including John Ringling, is

concerned with the transactions giving rise to the Circus Note and the proper amount of the interest of the bankrupt therein, as well with the value of each article of collateral held as security for the payment of the said note. Your petitioner was particularly concerned in the eliciting of facts bearing upon the alleged defenses of John Ringling (as endorser of the Circus Note), the said Ringling having asserted and attempted to establish, as hereafter appears [fol. 193] more fully, that he endorsed said note and surrendered the collateral thereto under duress and upon fraudulent representations.

The importance of this matter is seen when attention is directed to the fact that the interest of the estate in the note in question is $828,000, and that to date the payment of all interest thereon and the expert valuation of the collateral thereto indicates to the satisfaction of the Trustees and your petitioner that the note is collectible in full.

Under the agreements aforementioned, New York Investors, Inc., which had been succeeded by Clifford S. Kelsey and Charles H. Kelby, as Equity Receivers of New York Investors, Inc., at the date of the commencement of the bankruptcy proceeding herein, held the collateral pledged by John Ringling for the benefit of the bankrupt and the group of individuals comprising the syndicate participants. The proper legal relationship between New York Investors, Inc., the bankrupt, John Ringling and the other parties concerned in the contracts previously mentioned was the subject of intensive factual and legal research by your petitioner, and throughout the administration of this estate, has required constant advice by your petitioner and consultation with the Trustee in Bankruptcy herein as to the proper steps to be taken for the protection of the interests of the bankruptcy estate. In connection with this legal relationship, your petitioner prepared various reports at various times for the Trustees. Your petitioner, at the request of the Trustees, prepared a summary report which dealt with the fact situations and the legal relationship aforementioned, which report consisted of more than sixty-five (65) typewritten pages.

[fol. 194] On two separate occasions, John Ringling commenced legal proceedings in an attempt to void the pledge of the various items of collateral. The first of these attempts occurred in October, 1933 when John Ringling made

application to the Bankruptcy Court having jurisdiction in this proceeding, for permission to institute litigation against the Trustees in Bankruptcy herein. This application was opposed by your petitioner, as counsel to the Trustees herein, and was finally denied. In connection with this application of John Ringling, your petitioner was required to prepare legal memoranda and affidavits in opposition, to attend at court on the argument of said motion, and to advise the Trustees in Bankruptcy with respect to the aplication.

The second attempt by John Ringling to void the pledge of the collateral occurred in the latter part of May and the first part of June, 1934. At this time John Ringling made an application for leave to institute an action in the United States District Court for the Eastern District of New York against the Trustees in Bankruptcy herein. This application was opposed by your petitioner on behalf of the Trustees in Bankruptcy, and was finally denied. In connection with this application, your petitioner was required to study and analyze the moving papers, consisting of more than thirty (30) typewritten pages, to engage in legal research with respect to the exclusive jurisdiction of the Bankruptcy Court in such matters, the condition upon which leave would be granted to a plaintiff to sue Trustees in Bankruptcy in an action to avoid a contract on account of hardship and oppression, to prepare memoranda of law in opposition to said motion, and to attend at court and argue the said motion, as well as to consult with the attorneys for the Re-
[fol. 195] ceivers in Equity of New York Investors, Inc. in connection with the memoranda of law prepared by them in opposition to said motion.

In connection with the general legal problem concerned with the legal relationship between New York Investors, Inc. and the beneficial owners of the note held by New York Investors, Inc., your petitioner was required to engage in intensive legal research involving among others, the following legal questions:

(a) determination of the question whether New York Investors Inc. had an agency coupled with an interest, or was a Trustee of the collateral;

(b) determination of the value of the respective interests of the owners of the note in the collateral, as changed by

the agreement of September, 1932, which gave to Resource Holding Corporation and Manufacturers Trust Company an interest in the collateral;

(c) the determination of the procedure, if any, that should be undertaken by the Trustees to protect the value of the collateral;

(d) determination of the respective rights, on the one hand, of the bankrupt and other beneficial owners of the note, and on the other hand, New York Investors Inc., to 100 shares of the stock of Ringling Brothers Barnum & Bailey Combined Shows then held by New York Investors Inc.;

(e) the question of the removal of the equity receivers of New York Investors Inc. as custodial agents or trustees of the collateral;

[fol. 196] (f) the legal effect of the contribution by the various syndicate participants.

16. Litigation with Respect to Personal Property in the Fremont, Ohio Theatre.

Prior to the bankruptcy proceedings of Paramount Publix Corporation, the theatre owned by the bankrupt in Fremont, Ohio had been occupied by Publix-Ohio Corporation, a subsidiary of Publix Enterprises, Inc., which in turn was a subsidiary of Paramount Publix Corporation. The Publix-Ohio Corporation had been adjudged a bankrupt in the District Court of the United States for the Northern District of Ohio, Western Division.

In December, 1933, the Trustee in Bankruptcy of Publix-Ohio Corporation commenced a proceeding in the Bankruptcy Court in Ohio to determine the interest and claims to title to the personal property in the Fremont, Ohio Theatre and for permission of that Bankruptcy Court to sell the personal property free of said liens or interests. The Trustees in Bankruptcy herein claimed title to said personal property by virtue of the agreement of January 27th, 1927, between Paramount Publix Corporation and the bankrupt and by virtue of the other agreements in modification thereof and supplemental thereto. Your petitioner, as counsel to the Trustees in Bankruptcy herein, filed an

answer in this proceeding and obtained adjournments of said motion from time to time.

In connection with this proceeding, your petitioner was required to examine the various agreements and contracts between Paramount Publix Corporation and the bankrupt, to investigate into the existence of any contracts and leases between Paramount Publix Corporation and Publix-Ohio Corporation, to investigate the circumstances surrounding [fol. 197] the occupation of the Fremont Theatre by the Publix-Ohio Corporation, and the value of the personal property in controversy. A great deal of correspondence between your petitioner, as counsel to the Trustees, and the Trustee in Bankruptcy of Publix Ohio Corporation was necessary.

After many conferences with the attorney for Publix Ohio Corporation, with the attorneys for Paramount Publix Corporation and with the attorneys for Realty Associates, Inc. and Realty Associates Securities Corporation (the holders of mortgages claiming to have a lien on said personal property), a tentative agreement of compromise was drawn by your petitioner which involved a new lease of this theatre to a new corporation to be formed by the Trustees in Bankruptcy of Paramount Publix Corporation.

A great deal of time and attention of attorneys associated with your petitioner and of members of your petitioner's firm was consumed in the settlement of the question of title to the personal property in the Fremont Theatre, inasmuch as this question had an important bearing upon the title of the Bankrupt estate to the personal property situated in other theatres owned by the Bankrupt.

17. Continuance of business.

The Trustees in Bankruptcy were authorized from time to time, by orders of Court, to continue the operation of the business of the Bankrupt. This consisted principally in the operation of four theatres, including one office building, i. e., the Brooklyn Paramount Theatre and Office Building, the Paramount Theatre, Glens Falls, New York, the [fol. 198] Paramount Theatre, Fremont, Ohio, and the Paramount Theatre, Birmingham, Alabama.

Two of the theatres, i. e., the Paramount Theatre, Glens Falls, New York, and the Paramount Theatre, Birmingham, Alabama, had been leased by the Bankrupt to the Upper

New York Theatres Inc. and the Birmal Theatre respectively. The Trustees, with the advice and consultation of your petitioner, continued these leases and continued to receive the rents and additional percentage rents due thereunder. Constant supervision of these theatres was required of the Trustees and your petitioner as counsel. At one time a serious fire occurred in the theatre in Birmingham, Alabama, and there was a possibility that the lessee would discontinue the operation of the theatre. The Trustees, with the advice and consultation of your petitioner, caused the damage to be repaired and the operation of the theatre to be continued without interruption.

The theatre located in Fremont, Ohio, was being operated at the date of the bankruptcy herein by arrangement with a Mr. Shea under an agreement for a payment of a minimum rental and of a percentage of gross receipts. The Trustees, with the advice and consultation of your petitioner, continued this arrangement and continued to collect the rents under the aforementioned arrangement.

At the commencement of the bankruptcy proceeding the Brooklyn Paramount Theatre was being operated by the Extension Theatre Corporation, a corporation, 50% of the stock of which was owned by the Trustees in Bankruptcy of Paramount Publix Corporation, and the remaining 50% of the stock being owned by the Bankrupt. The Extension Theatre Corporation was operating the theatre under a [fol. 199] lease from the Bankrupt. Upon the appointment of the Trustees, with the advice and consultation of your petitioner they continued the lease to Extension Theatre Corporation. The continuance of this lease and the operation of the theatre was essential in order to preserve the film franchise for the theatre, since most of the value of the theatre consisted of the good will involved in a going business. The stock of Extension Theatre Corporation, in the name of the Bankrupt, was transferred into the names of the trustees in bankruptcy. Constant supervision of the affairs of the Extension Theatre Corporation was necessary because of the then prevalent economic conditions, and it was necessary at one time to modify the lease between the Bankrupt and Extension Theatre Corporation, since the percentage rentals called for by the lease were more than could be carried by this subsidiary of the Bankrupt. At another time it was necessary for the Trustees to finance

temporarily the operations of the Extension Theatre Corporation. This was done with the advice and consultation of your petitioner.

The necessity for the modification of the lease between the bankrupt and Extension Theatre Corporation, referred to above, arose out of the fact that the original lease with Extension Theatre Corporation provided for the payment of rental upon a basis of percentage of gross receipts. The theatre involved, the Brooklyn Paramount Theatre, had been operating upon what is called a combined picture and stage show policy. A thorough investigation by the Trustees and your petitioner of conditions in the moving picture theatre business generally, and in particular into the con- [fol. 200] ditions surrounding the operation of the Brooklyn Paramount Theatre and other theatres operating in neighborhoods similar to that in which the Brooklyn Paramount Theatre is located, disclosed that, under the economic conditions at that time obtaining, the Brooklyn Paramount Theatre could not operate on the box office charges which could be obtained and pay its necessary operating expenses and also rent on the percentage basis which the lease provided. Numerous conferences were held between your petitioner, the Trustees, representatives of the Trustees in Bankruptcy of Paramount and their attorneys and as a result thereof a modification of the lease was provided, under which Paramount Distributing Corporation which was furnishing motion picture films, instead of receiving, as previously, 15% of the gross receipts in payment of their film rentals, finally agreed, upon the insistence of the Trustees and your petitioner to accept a basis of payment which would make the film rental charges contingent upon net income in the same measure as the Theatre rental charges paid to the bankrupt estate. To summarize, the new arrangement provided that the Theatre should be operated by the bankrupt estate and Paramount (pending the termination of the existing litigation) on a mutual return basis so that there would be deducted from the gross income the necessary operating expenses of the Theatre (exclusive of film rentals, taxes and rent) and that there should be paid to Paramount and the Bankrupt estate out of the net 50% for film rental and 50% to the estate for theatre rental. The negotiations referred to above resulted in the continued operation of the theatre, the closing of which

was seriously threatened, thus saving to the bankrupt estate [fol. 201] a very substantial asset in the nature of good will, and one which your petitioner foresaw would be essential to an eventual adjustment of the litigation with Paramount Trustees on a basis profitable to this bankrupt estate.

In connection with the continuance of business, there was also involved the matter of properly covering by insurance certain objects of art contained in the Brooklyn Paramount Theatre. The title to these objects of art was in dispute and, accordingly, it became important to assure the estate that there should be no loss of this contested asset, either by damage by fire or some other cause. This matter involved conferences with the attorneys for the Trustees of Paramount and with representatives of Paramount Trustees and further conferences with the Trustees of this bankrupt estate. After such conferences and a thorough consideration of the matter, your petitioner recommended that, to assure the estate against possible loss and to maintain its position of claimant to certain rights in these objects of art, the estate should cover the same by insurance. Accordingly, the Trustees determined, upon the advice of your petitioner, to cover the said objects of art by proper policies of insurance.

The matter of the services rendered in connection with Brooklyn Paramount Theatre and the operation thereof by Extension Theatre Corporation is emphasized because of the fact that this Theatre represented the largest single item of cost in the theatre building program, to effect which the bankrupt was organized. The Brooklyn Paramount Theatre was erected by the bankrupt at a cost in excess of $4,000,000, and it is obvious, in order to conserve the assets and business of the bankrupt, it was essential to give the [fol. 202] most careful care and consideration to the management of this asset. The problems in connection with the management of the theatre arose continually over a period of many months and included, among others, the following:

(a) Examination and consideration of weekly statements of box office receipts, operating expenses, etc.

(b) Conferences with the Trustees in May, 1934, when Extension Theatre Corporation proposed to permanently

discontinue operation of the theatre and to surrender its lease, and consideration of the possibility of increase of insurance because of a technical vacancy in the theatre.

(c) Conferences with the Trustees and Paramount representatives in consideration of the time when the theatre should be closed for the summer season in order to minimize losses ordinarily incurred during the summer months..

(d) Conferences with and advice to the Trustees in connection with proper representation upon the Board of Directors of Extension Theatre Corporation.

(e) Conference with and advice to the Trustees in connection with the transfer of the stock of the corporation to the representative of the Trustees..

(f) Conferences with the Trustees and others and advice [fol. 203] to the Trustees upon a threatened strike of the Union, to which the engineers operating the heating and air conditioning plants in the building belonged.

(g) The obtaining of proper schedules of equipment installed in the theatre and arranging for proper care of said theatre eequipment during the period in which the theatre was closed in the summer of 1934.

The operation of the business of the bankrupt included also the collection of interest, and the receipt of dividends upon securities held by the Trustees, in connection with which your petitioner was required from time to time to advise the Trustees in Bankruptcy.

18. Other Litigations and Related Matters.

There were a number of other matters involving litigation which required the services of your petitioner, including, among others:

(a) A proceeding to compel Halsey, Stuart & Co. the paying agent under the issues of bonds and debentures of the Bankrupt, to return to the estate the amount of approximately $25,000 which had been paid to them on account of interest payments to bond holders and debenutre holders, but which had not yet been collected by said bond holders and debenture holders.

(b) The City of Sarasota and the County of Sarasota, Florida, filed tax assessments affecting the paintings and works of art which were included as part of the collateral [fol. 204] held for the payment of the Circus note. The pledgor of the collateral, John Ringling, having refused to take proceedings to protect the collateral from these assessments, which under any version of the value of the paintings were grossly excessive and unfair, the Trustees herein, with the advice and consultation of your petitioner, engaged counsel in the State of Florida to commence actions to void the tax assessments for the protection of the interest of the Bankrupt in the collateral. Two such actions were commenced in Chancery in the Circuit Court, 27th Judicial Circuit, Sarasota County, Florida, entitled: "Rembrandt Corporation, a corporation of Delaware, Plaintiff, against Charles G. Strohmeyer, as Tax Collector of Sarasota County, Florida, Defendant", and "Rembrandt Corporation, a corporation of Delaware, Plaintiff, against City of Sarasota, a Municipal Corporation under the Laws of Florida, and J. E. Richards, City Tax Collector of the City of Sarasota, Defendants".

In connection with these assessments and the actions commenced to void them, your petitioner, as counsel to the Trustees, was required to draw a petition and order for the retention of counsel in the State of Florida to investigate the validity of the tax assessments, and to confer at various times with the special counsel and with the attorneys for the Equity Receivers of New York Investors, Inc. In addition, your petitioner, as counsel to the Trustees herein, finally obtained an assumption by the Equity Receivers of New York Investors, Inc. of liability for counsel fees and expenses in connection with the aforementioned actions.

(c) At one time during the proceeding it became necessary for your petitioner, as counsel to the Trustees, to in- [fol. 205] vestigate in connection with an attempt by John Ringling to regulate the affairs of the Rockland Oil Company and the Oklahoma Oil Company, in a manner which the Trustees herein deemed harmful to their beneficial interest, in the stocks and bonds of these companies, which were included in the collateral held as security for the payment of the Circus Note. Your petitioner was required to attend various conferences between the Trustees in Bank-

ruptcy herein and the Equity Receivers of New York Investors, Inc., and to confer with the attorneys for the Equity Receivers of New York Investors, Inc. in connection with the injunction proceedings in the State of Oklahoma to prevent the attempted action by John Ringling.

(d) The three Trustees, Stephen Callaghan, Percival E. Jackson and William M. Greve, were elected at a meeting of creditors on August 25, 1933. The appointment of Mr. Greve, however, was disapproved by the Referee. An appeal was taken from the decision of the Referee by attorneys for William M. Greve, and upon the appeal the decision of the Referee was reversed.

Although your petitioner was not at this time formally retained by the Trustees, pending the qualification of the third trustee, nevertheless, as previously stated, your petitioner had been informally retained by the Trustees from the date of their appointment and continued to advise and consult with the Trustees prior to their formal retention by an order of the Court with respect to the various legal matters involved. In connection with the proceedings for approval of Mr. Greve, as Trustee in Bankruptcy, your peti- [fol. 206] tioner was required to attend at Court on various occasions so as to be familiar with the entire proceedings and to advise the two trustees who had been approved and qualified as to their respective rights and liabilities in the situation. These services were performed by your petitioner at the request of the two Trustees who had been appointed and qualified and without obligation to them in the event that the retention of your petitioner should not be subsequently authorized by the Court.

(e) The Department of Taxation and Finance of the State Tax Commission of the State of New York commenced a proceeding to determine, under Section 260 of the Tax Law, the portion taxable in the State of New York of the $150,000 mortgage executed by the bankrupt to Realty Associates, Inc. A hearing in this proceeding was held at Albany, New York. In connection with this proceeding your petitioner was required to prepare affidavits and to investigate with respect to the value of the property situated in New York, which property together with another theatre property situated in Fremont, Ohio, was subject to a blanket first mortgage in the amount of $250,000, and to

attend at a hearing before the State Tax Commission in Albany, New York.

(f) During the litigation with Manufacturers Trust Company as Trustee under the First Mortgage Indenture executed by the Bankrupt, the question of the ownership of the choses in action against Loew's Theatre & Realty Corporation and Loew's Incorporated, was of paramount importance. At one stage in the controversy with the Manufacturers Trust Company your petitioner, as counsel to the [fol. 207] Trustees herein, made application to the Referee herein for a hearing determining that the choses in action against Loew's Theatre & Realty Corporation and Loew's, Incorporated belonged to the bankruptcy estate and was not subject to the lien of any of the mortgages upon the real property and for permission to sell the choses in action. The pendency of this proceeding to sell the choses in action against Loew's Theatre & Realty Corporation and Loew's, Incorporated had a very large and important bearing upon the ultimate result of the litigation with Manufacturers Trust Company upon its application for permission to foreclose its mortgage and was responsible, in part, for the ultimate form in which permission was given to Manufacturers Trust Company to foreclose the mortgage. As previously stated, the permission granted to Manufacturers Trust Company to foreclose was so restricted that it eliminated the principal defense interposed by Loew's Theatre & Realty Corporation and Loew's Incorporated in the actions against them, i. e., prospective and present failure of consideration through the foreclosure of the mortgage. This proceeding was commenced by the Trustees with the advice and consultation of your petitioner and in connection therewith, your petitioner was required to investigate exhaustively the question of the legal ownership of the choses in action, distinguished from the ownership of the fee title to the real properties.

(g) The former attorneys for John Ringling, who had commenced the first proceeding by John Ringling in his attempt to void the pledge of the collateral as security for the Circus note, made application to the Court for permission [fol. 208] to commence an action against John Ringling for fees for their legal ser-ices and for permission to serve a warrant of attachment upon the Trustees in Bankruptcy

herein and to attach the reversionary interest of John Ringling in the collateral which was held as security for the payment of the Circus note. This application was granted by the Bankruptcy Court, service of an affidavit and warrant of attachment on the Trustees in Bankruptcy herein was had and your petitioners, as counsel for the Trustees, prepared and served, pursuant to the order of the Court, a return on the attachment. In connection with this proceeding your petitioner as counsel to the Trustees was required to study various problems of fact and law including, among others, the following:

The ability of a plaintiff to attach a reversionary interest of a defendant by service of a warrant of attachment, the drawing of a counter-order upon the motion for permission to serve the warrant of attachment, which counter-order was signed by the Court, the verification of a long list of stocks, bonds, notes and real property which was held by New York Investors, Inc. and/or its equity receivers and/or the Bankrupt in connection with the pledge by John Ringling of the collateral as security for the Circus note as well as the study and analysis of the validity of the warrant of attachment and the affidavit upon which it was granted. In connection with this proceeding, one or more attorneys associated with your petitioner attended at Court on several days.

(h) Rembrandt Photo Studios, one of the tenants in office space of the Brooklyn Paramount Building, made an [fol. 209] assignment for the benefit of creditors. At the time of the assignment the Rembrandt Photo Studios was indebted to the Trustees herein on account of rent. Your petitioner, as counsel to the Trustees herein, investigated into the situation, determined the amount of rent due and prepared and filed a claim with the assignee for the benefit of creditors.

19. Concerning the Volume of Legal Services Involved.

The immense volume of legal services involved in the litigation and administration of this estate is indicated by the fact that the entries in the Clerk's docket of the United States District Court for the Eastern District of New York with respect to orders and proceedings in the bankruptcy estate covers more than three entire pages.

The volume of the litigation is also indicated by the fact that the correspondence file of your petitioner, in connection with the affairs of the estate, consists of more than 1500 pages. All of these letters are original letters received and sent by your petitioner, approximately one-half of the total being letters dictated by your petitioner, none of which are form letters, and each letter requiring individual dictation.

Your petitioner and the Trustees prepared a number of Trustees' Reports and filed the same with the Referee. These reports alone are approximately thirty-five (35) typewritten pages.

In connection with the complicated affairs of the estate, your petitioner was required to examine many reports of accountants. Your petitioner examined more than fifteen (15) individual reports of accountants, consisting of [fol. 210] more than two hundred fifty (250) printed pages together with many lengthy statements.

More than two hundred (200) pages of agenda for and reports of meetings and conferences of the Trustees and other parties were prepared by your petitioner.

In connection with the claims filed with the Referee, your petitioner caused a list of claims by bondholders and debenture holders to be prepared. Preparation of this list required the services of an extra stenographer for approximately two (2) months, working continuously in the Referee's office. The completed list comprises more than four hundred fifty (450) closely typewritten pages.

In connection with the examinations of the bankrupt and witnesses at the meetings of creditors and adjournments thereof, and under Section 21-a of the Bankruptcy Act, your petitioner engaged in examinations of more than thirty-four (34) witnesses. In obtaining the testimony of these witnesses, your petitioner was required to draw subpoenas and subpoenas duces tecum and cause the same to be served upon the witnesses. Considerable difficulty was encountered in service of the subpoenas as some of the witnesses and continual conferences with process servers was necessary. A great deal of factual research was engaged in by your petitioner in determination of the books, records, etc., for which subpoenas duces tecum were required.

Your petitioner prepared many memoranda of matters and facts necessary to be developed at these examinations. These memoranda consisted of more than one hundred

(100) typewritten pages. Moreover considerable time and attention was devoted by your petitioner to the examination [fol. 211] of one hundred (100) exhibits introduced into testimony, many of which exhibits consisted of lengthy agreements. Mention might be made of a single exhibit examined by your petitioner consisting of three franchise agreements between subsidiaries of Paramount Publix Corporation and subsidiaries of Loew's Incorporated which agreements consisted of more than seventy-five (75) typewritten pages.

In connection with the making of an income tax return for the year 1933, your petitioner was required to study and examine a report of accountants consisting of more than ten (10) pages.

During the administration of the estate, your petitioner prepared and filed a number of miscellaneous incidental petitions and orders, such as orders for retention of accountants, orders for payment of taxes, investment of funds, tax bar orders and others. Most of these petitions and orders were the result of successive drafts and revisions and necessitated conferences with the Clerk of the Eastern District Court and with the Referee. These miscellaneous and incidental orders alone are approximately two hundred (200) typewritten pages.

Your petitioner, as counsel to the Trustees, commenced and prosecuted six actions upon notes. Your petitioner prepared, as a result of successive drafts and revisions thereof, summonses, complaints, judgments, stipulations, bills of costs, affidavits of regularity, replies, etc., all of which comprised more than sixty-five (65) typewritten pages. In connection with these actions, your petitioner was required to examine answers of defendants in two of the actions which approximated fifteen (15) typewritten pages, and your petitioner was required to engage in a considerable volume of correspondence in connection with the prosecution and/or settlement of these actions.

[fol. 212] Upon the proceedings for removal of one of the Trustees, your petitioner was required to attend at hearings and to become familiar with the briefs of counsel and the opinion of the Circuit Court of Appeals for the Second Circuit upon an appeal from a decision of the Referee. The minutes of the hearing on an order to show cause for removal of the Trustees comprised more than one hundred thirteen (113) typewritten pages. The opinion of the Cir-

cuit Court of Appeals alone is composed of sixteen (16) pages.

In connection with the turnover proceeding commenced against Halsey, Stuart & Co., your petitioner prepared a brief of seven (7) pages and an order to show cause consisting of about five (5) pages. Your petitioner was further required to examine and study a twenty-one (21) page brief of counsel for Halsey, Stuart & Co. and a four (4) page answer.

In connection with the three actions against Loew's Theatre & Realty Corporation and Loew's Incorporated, and exclusive of the pleadings in these actions, your petitioner prepared motion papers and orders, examined the decisions of the court and examined various motion papers received by petitioner from other parties in the actions. The legal papers on these intermediate proceedings alone constitute approximately two hundred fifty (250) typewritten pages. Your petitioner prepared many memoranda of law and submitted the same to the court on these intermediate motions. Approximately six (6) memoranda of law were prepared, consisting of more than twenty-five (25) typewritten pages. Most of the briefs, memoranda of law and intermediate motion papers were not finally [fol. 213] dictated, but because of their complicated nature, were the result of successive drafts and revisions thereof. Moreover, your petitioner was required to examine the various memoranda of law submitted by the opposing parties in these actions. In the third action, your petitioner was required to prepare a warrant of attachment and an affidavit therefor.

In connection with the discussions for settlement of the actions against Loew's Theatre & Realty Corporation and Loew's Incorporated, your petitioner was required to examine title insurance policies and reports of title searches. These reports and policies constituted approximately forty (40) closely printed pages.

In connection with the effecting of the Loew's Settlement Agreement, your petitioner was required to prepare legal memoranda and briefs of law (consisting of more than thirty (30) pages) with respect to the possibilities of settlement through reorganization, as well as to draw an outline of a plan of reorganization and consider amendments proposed by the First Mortgage Committee.

In connection with the agreement for settlement of the actions against Loew's, your petitioner examined many schedules of accountants with reference to the application of the payments to be made by Loew's in reduction of the bond indebtedness of the bankrupt, and drafted and revised upwards of fifteen (15) lengthy drafts of the proposed Loew's Settlement Agreement. Many copies of these drafts were typed for use by the parties engaged in the conferences for settlement. In addition, a lengthy petition of some forty (40) pages to compromise the Loew's action [fol. 214] was drafted. Many opinions were rendered by your petitioner to the Trustees during the continuance of these conferences with reference to various methods of effecting the settlement. In the foreclosure action commenced by the Manufacturers Trust Company, as Trustee, the volume of pleadings prepared and served by your petitioner exceeds twenty (20) typewritten pages. These pleadings were the result of successive drafts and revisions thereof.

Upon the proceedings by Manufacturers Trust Company for a segregation order and for permission to foreclose, your petitioner drew and submitted to the Court various briefs and legal memoranda comprising more than sixty (60) pages. The minutes of a hearing before Judge Moscowitz on the settlement of the segregation order granted to Manufacturers Trust Company are more than twenty-one (21) typewritten pages. Successive drafts and revisions of the order for segregation and the resettled order for segregation and of the order for permission to Manufacturers Trust Company to foreclose, were also drawn by your petitioner.

In connection with the operation of business by the Trustees, your petitioner was required to study weekly reports of the operations of the Extension Theatre Corporation and to examine a report of more than five (5) pages rendered by Mr. Shea in connection with the operation of the Fremont Theatre.

The record of the proceedings in the application of Mr. Davison for payment of his fee, including a transcript of record of the Circuit Court of Appeals, the brief on the argument of the appeal, testimony before the Special Mas- [fol. 215] ter, incidental motion papers, petitions, orders, assignments of errors and miscellaneous legal memoranda

submitted to the Eastern District Court, alone comprises approximately three hundred sixty (360) typewritten and printed pages. Of this amount, approximately one hundred fifty (150) pages consist of papers prepared by your petitioner after successive drafts and revisions.

In connection with the questions of law and fact involved in the Circus Note and the interest of the bankrupt therein, and exclusive of the formal sixty-five (65) page report rendered by your petitioner to the Trustees, your petitioner prepared numerous memoranda of law and fact, part of which was submitted to the Trustees and part of which was filed in the proceedings. These memoranda of law and fact exceeded one hundred (100) typewritten pages. In addition, your petitioner engaged in much correspondence with respect to this note.

In connection with the controversy over title to the equipment in the Fremont Theatre, your petitioner drew and filed an answer of approximately ten (10) typewritten pages, drafted a twenty-five (25) page petition to effect the compromise agreed upon, and, after successive drafts, revisions and conferences with the various attorneys involved, your petitioner finally drew an agreement for settlement consisting of more than forty (40) pages. Also, in connection with this matter, your petitioner prepared many memoranda of facts for the use of the Trustees.

In connection with the actions commenced in Florida to void the tax assessments made upon the objects of art, [fol. 216] which were collateral to the Circus Note, your petitioner engaged in much correspondence with the Special Counsel for the Trustees and was required to investigate into the facts and to examine two complaints of approximately sixty (60) pages, as well as to draw many memoranda of fact for the use of the Trustees.

In connection with the claims by the United States Government for additional income taxes for the years 1930, 1931 and 1932, your petitioner was required to engage in a large volume of correspondence and to prepare memoranda of fact and law exceeding twenty (20) pages for the use of the Trustees as well as to examine the special report of accountants consisting of more than eight (8) pages in connection with these claims.

In conclusion, your petitioner, among other contracts and agreements, was required to become thoroughly familiar

with all of the contracts and agreements contained in a volume entitled "Allied Owners Corporation, First Mortgage Real Estate 6% Sinking Fund Gold Bonds and Serial 6% Gold Debentures, 1927-1928." This volume contains a great many of the agreements executed at the time of the erection and sale of the seven theatre properties of the bankrupt to Paramount Publix Corporation and at the time of the issue of the First Mortgage Real Estate 6% Sinking Fund Gold Bonds and Serial 6% Gold Debentures by the bankrupt. This volume is composed of four hundred eighty-one (481) pages of contracts, correspondence, leases, trust indentures and others. Your petitioner and attorneys associated with your petitioner necessarily spent a great deal of time and intense concentration upon the material [fol. 217] contained in this volume and in analyzing and construing the language of the contracts and agreements therein contained.

On the following pages we have summarized, for convenient reference, the number of pages of data, of letters received and sent, reports prepared and examined, briefs prepared and examined, pleadings, etc., etc.:

Summary of Correspondence, Reports, Briefs, Memoranda, Testimony, etc., Prepared, Received, Examined, etc.

Letters received and sent	1500 pages
Trustees' Reports prepared and filed	35 "
Accountants' Reports examined, considered and digested	250 "
Agenda for, and Reports of Meetings and Conferences of Trustees and others	200 "
Preparation of lists of bondholders' claims filed in Referee's office	450 "
Examination in 21-a Proceedings	34 Witnesses
Minutes of 21-a Proceedings	1300 pages
Memoranda for use in 21-a Examinations	100 "
Examination and consideration of several hundred pages of Exhibits introduced in 21-a Examinations	100 Exhibits
Examination and consideration of Reports of Accountants for Tax Returns	10 pages
[fol. 218] Preparation of miscellaneous incidental Petitions and Orders consisting of about	200 "

Preparation of complaints, stipulations, judgments, affidavits, etc., in six actions on notes	65 pages
Examination and consideration of Petition, Answer, Briefs, Orders, Decisions, etc. in connection with removal of Trustee, consisting of more than	110 "
Preparation of order to show cause and brief, and examination and study of brief and answer of counsel for Halsey, Stuart & Company	37 "

Loew Proceedings:

Preparation of motion papers and orders; examination of decisions and motion papers of other parties, aggregating	250 "
Memoranda of law submitted	25 "
Examination of title reports and policies	40 "
In connection with settlement agreements, legal memoranda and briefs, more than	30 "
Fifteen drafts of proposed Loew's settlement agreement, more than	250 "
Proposed petition to compromise actions against Loew's	40 "
Pleadings examined, prepared and received in first action against Loew's	489 folios
[fol. 219] Ditto in second action against Loew's	477 "
Ditto in third action against Loew's	477 "
Ditto in third action against Loew's	300 "
Book of Exhibits prepared by petitioner in connection with actions against Loew's	666 "

Manufacturers Trust Company Proceedings:

Pleadings prepared and served in action of Manufacturers to foreclose mortgage	20 pages
In proceedings of Manufacturers for segregation order and for permission to foreclose, briefs and memoranda submitted to Court	20 "

Davison Matter:

Brief for argument of appeal, motion papers, petitions, orders and miscellane-	

Davison Matter—Sontinued:

ous legal memoranda submitted to Court, including testimony before the Special Master, aggregate	360	"
Typewritten and printed pages of which original papers prepared by your petitioner, after proofs and revisions, are approximately	150	"

[fol. 220] Ringling-Circus Note:

Report on status, including security, etc., rendered to Trustees	65	"
Memoranda of law and fact	100	"

Fremont Theatre Equipment Matter:

Petition to effect compromise	25	"
Agreement for settlement	40	"
Answer filed	10	"
Examination and consideration of two complaints in connection with Florida Tax Matter	60	"

Income Tax Claims:

Memoranda of fact and law for use of Trustees	20	"
Examination of Special Report of Accountants	8	"
Bound volume containing all papers which form the background of all the bankrupt corporation's relationships with its creditors, bondholders, note-holders, Loew's, etc., and containing leases, trust indentures, contracts, composed of	481	"

It is obvious that the services performed by your petitioner, including 4508 hours of work in the recovery of the assets of the Bankrupt, in conducting such a large volume of litigation, all of which your petitioner believed to be necessary, and in advising the Trustees herein with respect to many complicated and sometimes novel questions [fol. 221] of law, and in particular, in the effecting in large

measure in this proceeding of a settlement with Loew's Theatre & Realty Corporation, and Loew's Incorporated, upon which the creditors of the estate will eventually receive the amount of $12,875,000, and which settlement assures the ability of bankrupt, now a Debtor in proceedings under Section 77B, to effect a reorganization plan, have been of exceedingly great value to the bankruptcy estate and to all of its creditors.

Your petitioner has endeavored to perform every legal service in connection with the estate which was necessary from the standpoint of protecting the interests of the creditors of the estate. At the same time it endeavored to confine the legal work to such matters as warranted the effort involved. These services your petitioner carefully performed and in the interests of the creditors, and your petitioner believes it is fair that it should be justly compensated. Your petitioner therefore now requests an allowance in the amount of One Hundred Thousand ($100,000.00) Dollars, as full compensation for your petitioner's services to the Trustees in Bankruptcy herein for the period from August 28, 1933 to and including June 22, 1934.

In this connection your petitioner desires to state that for all of the period aforesaid one or more members of your petitioner's firm was actually engaged substantially from day to day in the rendition of the services hereinbefore enumerated, and that for a period of eight months two associate attorneys were assigned to the business of this bankrupt estate and devoted their entire time thereto, to the exclusion of all other business of any kind.

In addition, thereto, during the entire period aforesaid, [fol. 222] your petitioner employed two competent legal stenographers wholly in and about the rendition of services in connection with the bankrupt estate, and from time to time, as the press of work required, your petitioner assigned one or more other stenographers in your petitioner's employ to the performance of stenographic work in connection with the business of this estate. No separate charge or claim of any kind is made herein for services rendered by either of the two stenographers exclusively employed on the business of this estate, nor for any of the additional stenographic services rendered by other stenographers in your petitioner's employ. The only claim to special compensation for stenographic services is that set forth in Ex-

hibit "2", hereto attached, for outside stenographers employed from time to time by the day or week as the press of business required, and for night or Sunday work of stenographers in your petitioner's employ.

Your petitioner also requests that it be reimbursed in the amount of One Thousand Two Hundred Forty-seven and 80/100 ($1,247.80) Dollars for expenses and disbursements incurred by it in its capacity as counsel for the Trustees in Bankruptcy herein for the period from August 28, 1933 to and including June 22, 1934, an itemized account of which is attached hereto and made part hereof and marked Exhibit "2".

Your petitioner has received no compensation whatsoever for any of its services rendered to the Trustees in Bankruptcy herein, and has made no previous application for compensation in this proceeding or for allowance of your petitioner's disbursements.

All services for which compensation is requested in this [fol. 223] application were performed by your petitioner for and on behalf of the Trustees in Bankruptcy, and not on behalf of any Committee, creditor or other person. Pursuant to General Order in Bankruptcy of the United States Supreme Court, #XLII, this petition is accompanied by an affidavit attached hereto, stating that no agreement has been made, directly or indirectly, and that no understanding exists for a division of the fees between your petitioner and the Trustees, the bankrupt, or the attorneys of any of them.

Wherefore, your petitioner prays that an allowance as aforesaid as full compensation for their services as counsel to the Trustees in Bankruptcy, for the period from August 28, 1933 to and including June 22, 1934, be made to them out of the assets of the Debtor's estate, that they be reimbursed in the amount stated for expenses and disbursements for the period from August 28, 1933 and to and including June 22, 1934, and that after a hearing at a meeting of creditors to be called for that purpose, an order be entered allowing them such an amount as full compensation for their services and the amount of the expenses and disbursements incurred by them for the aforementioned period, and that such order direct Stephen Callaghan, Percival E. Jackson and William M. Greve, as Trustees of Allied Owners Corporation, Debtor, to pay your petitioner the sum of One Hundred and One Thousand Two Hundred and Forty-seven and 80/100

($101,247.80) Dollars, for fees and disbursements, out of the assets of the Debtor's estate.

Dated New York, N. Y., January 28th, 1935.

Goldwater & Flynn, by Monroe Goldwater, Petitioner.

[fol. 224] *Duly sworn to by Monroe Goldwater. Jurat omitted in printing.*

SUMMARY OF DIARY ENTRIES OF GOLDWATER & FLYNN, AS COUNSEL TO THE TRUSTEES IN BANKRUPTCY OF ALLIED OWNERS CORPORATION, FOR THE PERIOD FROM AUGUST 28, 1933 TO JUNE 22, 1934, INCLUSIVE

[Pursuant to stipulation between the attorneys for the appellant and Goldwater & Flynn, as appellees, duly approved on June 14, 1935, by Hon. Thomas W. Swan, United States Circuit Judge, the above-entitled Summary of Diary Entries is not printed in this printed transcript of record but three photostatic copies thereof will be filed with the transcript of record.]

[fol. 225] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF MONROE GOLDWATER, PURSUANT TO GENERAL ORDER IN BANKRUPTCY XLII

STATE OF NEW YORK,
County of New York, ss:

Monroe Goldwater, being duly sworn, deposes and says:

That this affidavit is made under and pursuant to General Order in Bankruptcy No. XLII of the Supreme Court of the United States; that he is a member of the firm of Goldwater & Flynn; that he makes this affidavit on behalf of and as the free act and deed of said firm; that no agreement has been made, directly or indirectly, and that no understanding exists for a division of fees between the petitioner and the Trustees in Bankruptcy, or any of them, the Bankrupt, or

any of its officers, directors or agents, or the attorney or attorneys for any of them.

Monroe Goldwater.

Sworn to before me this 28th day of January, 1935.
Louis R. Colman, Notary Public.

[fol. 226] EXHIBIT 2 TO PETITION OF ATTORNEYS FOR TRUSTEES

Expenses and Disbursements Incurred by Goldwater & Flynn in the Capacity of Counsel to the Trustees in Bankruptcy of Allied Owners Corporation for the Period from August 28, 1933 to June 22, 1934, Inclusive

1. Extraordinary Stenography:	
Services of stenographers (not regular employees) required on rush work from time to time during the ten month period, as well as the services of a special stenographer working in the Referee's office in compiling bondholders' lists	$266.50
Services of stenographers (regular employees) for night and Sunday work	216.50
2. Fees paid to Clerks for filing adjudications in bankruptcy, filing complaints, answers, etc.	38.66
3. Paid process servers for service of subpœnas for examination, service of summonses and complaints, and to a special process server for time and effort in many attempts to serve John Ringling and Emily Ringling and legal fees paid to witnesses	74.00
4. Photostats, Mimeographing, etc.:	
Photostats	59.15
Mimeographing proof of claim against Paramount Publix Corporation	47.25
Printing of pleadings and exhibits in actions against Loew's Theatre & Realty Corporation and Loew's Incorporated	137.51

[fol. 227]

5. Traveling expenses, telephone, etc.:	
Local carfares and phone calls	70.04

Out-of-town phone calls	.40
Out-of-town telegrams, principally to Jacksonville, Washington and Birmingham	4.57
Traveling expenses to Albany (matter of the mortgage tax proceeding by the New York State Tax Commission)	7.50
Air Mail postage	3.45
6. Dinners, hotels, etc.:	
Paid to employees for dinners (at the rate of $1.00 per dinner) engaged in overtime work during the ten month period	283.45
Sleeping accommodations at hotel for attorneys working past 1 A. M.	8.00
7. Loose leaf books to contain testimony of bankrupt and witnesses	4.60
8. Special stationery for use in compiling of bondholders' lists	23.97
9. Cost of Financial Chronicles to obtain market prices of securities at various dates	2.25
Total	$1,247.80

[fol. 228] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF BANKRUPT'S ATTORNEY FOR ALLOWANCE OF COMPENSATION

To the Honorable Theodore Stitt, Referee in Bankruptcy:

The petition of Robert P. Levis respectfully shows:

That he is the attorney for Allied Owners Corporation, the bankrupt in the above-entitled proceeding, and has been the attorney of record throughout the entire proceeding.

Petitioner was the attorney for Allied Owners Corporation for a considerable period prior to the filing of the bankruptcy petition and represented the Allied Owners Corporation in connection with its proceedings against Paramount Publix Corporation and the initial steps in connec-

tion with the default of Loew's, Inc. but for such services deponent was paid his fees and the present application is for services rendered in connection with the bankruptcy proceeding.

On June 22, 1933, your petitioner had a conference covering the entire day, with Francis T. Pender and Mr. Buckbee, officers of the Allied Owners Corporation. The situation caused by the default of the Loew's Theatre & Realty Cor-
[fol. 229] poration to pay the installment upon the purchase of theatres, due on June 1st, was gone into in detail, and your petitioner examined voluminous documents and agreements which covered the purchase of the Loew Theatres. Your petitioner also reviewed in great detail the Paramount agreements covering the four further theatres which had been sold to Paramount and the probable value and possibility of recovery upon the claim which your petitioner had filed on behalf of Allied Owners Corporation against the Paramount Publix Corporation amounting to the sum of $6,095,425.13. Your petitioner discussed in detail the character of suit which should be instituted against the Loew's Theatre & Realty Company and Loew's, Inc., for breach of unpaid installments and considered in detail the rights of Reconstruction Finance Corporation in view of the pledging of capital stock of this corporation and the pledging alike to the Reconstruction Finance Corporation of indebtedness of the bankrupt corporation.

The forms of the various mortgages held to protect the first mortgage bond issue and the second mortgage bond issue, and the third mortgage held by the New York Investors, Inc. were examined and discussed in detail. Your petitioner also examined the mortgages and the situation produced as a result of them, which covered the theatres at Glens Falls, N. Y. and Fremont, Ohio. The possible earnings of the various theatres were reviewed.

Your petitioner's final advice to the officers, after a complete and detailed review of the entire situation was that the assets of Allied Owners Corporation should be placed under the protection of a court and in your petitioner's judgment, in view of the uncertain value of the assets, your petitioner advised the filing of a voluntary petition in bank-
[fol. 230] ruptcy as the best method to both conserve the assets and present an opportunity for a compromise or adjustment with the creditors of the corporation.

Subsequently your petitioner attended a meeting of the board of directors and presented to the directors his view that the best interest of both the company, its creditors and stockholders would be conserved by a bankruptcy proceeding and your petitioner prepared and drafted the resolution passed by the board of directors authorizing the filing of a voluntary petition in bankruptcy.

Your petitioner immediately took steps to obtain a list, so far as was possible, of the various bondholders to whom the outstanding bond issues were owing. The first mortgage bond issue had outstanding bonds aggregating approximately $9,000,000 and the second mortgage bond issue had outstanding bonds aggregating approximately $1,800,000. The bonds were bearer bonds, title of which passed by delivery, held by very many bondholders, and your petitioner was met at the outset with the uncertainty as to who were the present holders of the bonds. Your petitioner obtained the names of bondholders, so far as they were known to the company through correspondence, from the company's offices, and applied alike to the brokers who had underwritten the bond issue, and obtained from Chicago the list of bondholders to whom certain of the bonds had been sold and from the best information available your petitioner prepared the scheduled list of bondholders which was annexed to the petition, covering a very large number of bondholders. Your petitioner alike scheduled the trustees of the bond issue so that any person not specifically mentioned might become a party to the proceeding.

Your petitioner considered with great care the way in which the real estate should be scheduled, in view of its [fol. 231] prior installment sale, so that there would be no election of remedies which would prevent the making of proper claims against each the Paramount Publix Corporation, Loew's Realty & Improvement Corporation and Loew's, Inc.

After the voluntary petition had been completed in all detail and had been verified by the President of the corporation, your petitioner filed in the office of the Clerk of the United States District Court for the Eastern District of New York the voluntary petition in bankruptcy, with schedules annexed, on August 8, 1933.

Your petitioner immediately notified the Brooklyn Trust Company, Corn Exchange Bank and the Central Hanover

Bank, the three banks in which the bankrupt corporation deposited its funds, that the petition had been filed, so that no checks would be honored; and immediately after giving such notification your petitioner appeared before the Honorable Marcus B. Campbell and urged that no receiver be appointed, in view of the fact that a receiver would but add expense without accomplishing any results for the benefit of creditors. The cash in bank, which aggregated approximately $340,000, had been protected against withdrawal by the notice served and the balance of the assets consisted of the seven theatres together with the various claims for damages, and notes receiveable amounting to almost a million dollars which your petitioner assured the court would remain in the safe of the corporation undisturbed pending the election of a trustee in bankruptcy.

Your petitioner, immediately after the conference with the Court, visited the Referee so that it might be called to his attention that a receiver would not be appointed if an immediate meeting of creditors were called for the election of a trustee. The Referee arranged for the immediate call-
[fol. 232] ing of a first meeting of creditors, setting such meeting for the 21st day of August, 1933, at two o'clock, in the Post Office Building.

The result was that no receiver was appointed of the assets of Allied Owners Corporation and the creditors were saved the expense of a receivership.

Two or three days following the filing of the voluntary petition were spent by your petitioner in answering the inquiries of the bondholders and their attorneys and explaining to them the reasons for the filing of the voluntary petition in bankruptcy and the condition of the assets.

Your petitioner furnished a detailed statement of assets and liabilities to Sullivan & Cromwell, who represented a large number of bondholders and who subsequently became the attorneys for the Bondholders' Committee, and had an extended interview with Mr. McQuillan, representing that firm.

On August 16th, prior to the election of the trustees, a petition was brought on for hearing before the Hon. Oscar W. Ehrhorn in the Southern District of New York, to approve an agreement for the operation of the Brooklyn Paramount Theatre, the Alabama Theatre at Birmingham and the Glens Falls Theatre, the agreement having been

made between Allied Owners and Paramount Publix Corporation prior to the filing of the bankruptcy petition. Your petitioner appeared before Referee Ehrhorn in support of the agreement, the plan was approved by the creditors of Paramount Publix Corporation, and an order was entered authorizing the Trustees of Paramount Publix Corporation to enter into the operating agreement which was of distinct advantage to the estate in view of the fact that it would put into the estate certain funds from these theatres.

[fol. 233] On August 21, 1933, your petitioner attended before the Referee in Bankruptcy at the first meeting of creditors, with two of the officers of the corporation, and upon application made by certain of the creditors who desired further time in order to prepare proofs of claim, the election was adjourned to August 25th, after the Referee had administered the oath to Francis T. Pender as President, and John G. Buckbee as Treasurer.

Your petitioner attended the adjourned first meeting of creditors on August 25th on behalf of the bankrupt corporation, made a statement to the creditors with reference to the assets of the corporation; and at said meeting Stephen Callaghan, Percival E. Jackson and William Greve were elected trustees, the court disapproving the election of William M. Greve and ratifying the election of the other two trustees.

Your petitioner attended on behalf of the bankrupt corporation the adjourned first meeting of creditors held on September 5th and the meeting was adjourned pending the hearing upon the review of the Referee's order disqualifying William M. Greve.

Your petitioner attended on September 8th before the Hon. Grover M. Moscowitz upon the petition to review the Referee's order of disqualification. Your petitioner argued on behalf of the candidate elected by the creditors and in opposition to the disqualification, and presented a brief asserting that the unanimous election by the creditors of a candidate for trustee who is neither an officer, director nor stockholder of the bankrupt and has no financial interest in it cannot be set aside because prior to the bankruptcy at the request of the officers of an affiliated company the candidate had conducted negotiations looking to the settlement [fol. 234] of a controversy, which existed between the bankrupt and a third party. Your petitioner urged upon the

court that the very fact that the candidate for trustee had conducted such negotiations gave him a knowledge of the affairs of the bankrupt company which would be beneficial to the creditors. The court sustained the election of the creditors and reversed the referee's disqualification.

Your petitioner ascertained that the schedules which had been prepared by him were not completely accurate and an application was prepared by your petitioner for leave to amend the schedules, particularly in order that certain assets which had not been placed in the original schedules should be tabulated. A motion was made before the Referee and was granted and your petitioner entered an order authorizing the amendment. Your petitioner also prepared the amended schedules, which were duly verified by the president of the corporation and filed.

The examination at the first meeting of creditors took a very wide scope and your petitioner represented the bankrupt throughout the course of this examination. The original hearings attended by your petitioner were adjourned from time to time in view of the fact that one of the trustees had been disqualified, and pending the determination of the final status of the trustee the hearings were adjourned on several occasions.

During this period your petitioner was in constant communication with the Trustees and the bankrupt's officers, furnishing to the Trustees information with which the administration might be conducted, in obtaining the voluminous documents covering the various transactions of the bankrupt corporation, and in examining these documents [fol. 235] and making suggestions to the Trustees and their attorneys.

The taking of testimony began on October 25th and continued for a very long period of time thereafter, some of the examinations covering an entire day. Creditors had intervened and conducted a portion of the examination, through Archibald Palmer, as attorney, and the examination covered not only an investigation of the circumstances under which the various assets of the corporation arose and the circumstances under which the liabilities arose, but also covered the circumstances surrounding the formation of the first Mortgage Bondholders' Committee and the Second Mortgage Bondholders' Committee, and the relation of the bankrupt with New York Investors, Inc. and with the subsidiaries of New York Investors, Inc.

Francis T. Pender, the president of the bankrupt, was examined at great length, the first examination alone covering 234 pages of testimony. In addition to Mr. Pender's voluminous examination, at the first meeting of creditors the following persons were examined: Fred L. Gross, the receiver of Realty Associates Securities Corporation, a subsidiary of New York Investors; William M. Greve, an officer of New York Investors, Inc. and one of the Trustees of the bankrupt; Alfred F. Young, an accountant associated with Stagg, Mather & Hough who had been accountants for the bankrupt; Clifford S. Kelsey, one of the receivers of New York Investors, Inc.; John A. Buckbee, the secretary of Allied Owners; Adolph Zukor, the President of Paramount Publix Corporation; Nicholas M. Schenck, the president of Loew's Theatre & Realty Corporation and Clark Stern, con-
[fol. 236] nected with Loew's Theatre & Realty Corporation; Leonard Buck, Ernest V. Niver, Warner Marshall, Jr., Russell G. Rankin, Albert J. Barry, Walter W. Taylor, William T. Caldwell, all members of the various committees; and William H. Schermerhorn of the Central Hanover Bank.

The examination covers 1,300 pages and there were offered into evidence over one hundred separate exhibits. Every detail of the business operations and conduct of the bankrupt corporation from the date of its incorporation up to the filing of the bankruptcy petition was gone through in great particularity. Voluminous contracts of the bankrupt corporation had to be examined in the most minute detail by your petitioner and there were almost daily conferences between your petitioner and the officers of the bankrupt corporation and its employees in order to obtain facts which were necessary for the trustee. Your petitioner was constantly, throughout the examination, faced with the difficulty of advising so that nothing elicited would lead to a waiver of the rights under the complicated contracts which existed nor an election of remedies that would bar actions which had already been instituted.

Prior to the bankruptcy, in conjunction with Alfred T. Davison, suit had been brought against Loew's, Inc. and Loew's Theatre & Realty Co. and as this involved the relation which the bankrupt bore to Paramount Publix Corporation, bankrupt, your petitioner was anxious that the conduct of the examination should not in any wise interfere with

the enforcement of the rights of the estate both against Paramount Publix Corporation, Loew's Theatre & Realty Corporation and Loew's, Inc.

[fol. 237] Your petitioner had to go over every transaction in great detail at the offices of the bankrupt corporation because of the danger that inaccurate statements of fact or misrecollections of fact and conclusions in the minds of the witnesses from legal documents might lead to testimony which would impede or destroy the assets of the estate. Conferences were held practically every day, and every day your petitioner examined documents and contracts and obtained information from the bankrupt's officers with reference to the facts surrounding the execution of contracts, the reasons why the various and complicated terms were placed in the contracts; and throughout it became necessary to intensively study both the terms of the contracts the condition of the company, itself, the facts surrounding the making of the contracts and the law which governed the relation of the parties.

Your petitioner particularly insisted from the outset of the proceedings in asserting claim that the guaranty of Loew's, Inc. belonged to the general creditors and was not the property of the Trustees under the various bond issues. Loew's, Inc. was amply responsible to meet its guaranties while in your petitioner's opinion such was not the condition of Loew's Theatre & Realty Company, or at least it was very doubtful. In the interest of the general creditors, your petitioner felt that this asset, which has ultimately, under the settlement with Loew's, Inc. been found to have a value of $12,800,000 when paid, should be preserved for all creditors and not for the secured creditors alone. Your petitioner carefully investigated the law and examined the authorities to sustain his position that this guaranty, which arose long after the pledging of the mortgages to the two [fol. 238] trustees of the two bond issues, was a general asset of the estate and did not pass to the trustees under the bond issue. The attorneys for the Trustees in Bankruptcy adopted this position throughout and in your petitioner's opinion this was one of the main reasons which caused the bondholders to hesitate to close out all rights of general creditors.

Ringling Brothers-Barnum & Bailey Combined Shows, Inc. and Circus City Zoological Gardens, Inc. had executed

a note for $1,117,320.67 in which note the bankrupt corporation had an interest of $828,000. The note was endorsed by John Ringling and collateral security had been deposited for the payment of the note. The money originally had been advanced by the Central Hanover Bank upon a guaranty of New York Investors and in turn the obligation owing to the bank had been paid in part by this corporation and the note was in the possession of the bankrupt corporation. John Ringling asserted misrepresentations in connection with the note, itself, and an application was made for permission to institute suit against the Trustees in Bankruptcy to set aside the note and to recover the securities. Your petitioner investigated in great detail all the facts surrounding the transaction from the inception of the loan. The investigation required conferences not alone with the officers of the bankrupt corporation but the officers of New York Investors, Inc. and the examination of all of the documents involved in the transaction. Your petitioner supplied many facts to the Trustees in their opposition and your petitioner argued in the District Court at the hearing, in opposition to the right of Ringling to bring a suit and to join the Trustees as parties defendant. The motion was denied.

[fol. 239] A second motion was made by John Ringling in the latter part of May, 1934, for leave to sue, alleging oppression in connection with the obtaining of the security and a sale of a portion of the security. Your petitioner argued this matter orally in the District Court, in conjunction with the attorneys for the Trustees in Bankruptcy and the motion was denied.

An application was made by the Manufacturers Trust Company for leave to foreclose mortgages which it held for the first mortgage bondholders, upon four of the theatre properties owned by Allied Owners Corporation. Your petitioner argued in the District Court in opposition to this motion, urging the rights of the second mortgage bondholders and the general creditors and urging upon the court, in view of its possession of the res, its sole right to retain any foreclosure proceedings and that such foreclosure, if granted, should be carried on in the United States District Court as ancillary to the bankruptcy petition, itself. The Court granted the application to the extent of permitting a foreclosure suit to be instituted but no further steps to

be taken without further application to the bankruptcy court.

Your petitioner collaborated with the attorneys for the Trustees in preparing an answer to the complaint of the Manufacturers Trust Company and further proceedings under this suit were suspended and stayed by virtue of the petition for reorganization.

An application was made by Realty Associates for a segregation of the rents and income received from the Glens Falls and Fremont theatres. Your petitioner appeared in the United States District Court in opposition to this mo- [fol. 240] tion which the court referred to Honorable Theodor Stitt, Referee in Bankruptcy, for his determination. Subsequently Realty Associates made application for leave to foreclose its mortgage upon these two theatres. At the hearing the court granted the application to the extent of permitting the foreclosure proceedings to be started, which were alike suspended by the filing of the reorganization petition pursuant to Section 77-b.

As a result of the suits instituted prior to bankruptcy, for which your petitioner makes no application for allowance in this proceeding in view of the fact that he was fully paid for such services prior to the bankruptcy, and in view of the subsequent suit brought by the Trustee, an extended negotiation covering fully two months was carried on with the Loew interests, looking toward an adjustment of differences between the parties and a settlement of the controversy. Throughout this entire period of negotiations, your petitioner was constantly consulted and constantly advised and made suggestions in the interests of the bankrupt estate. A settlement was ultimately consum-ated, and the form which the settlement took was submitted to your petitioner and your petitioner suggested and collaborated with the attorneys for the Trustees upon the various drafts of the settlement agreements which were finally signed by both parties. The result which will be obtained from this settlement makes reasonably certain that the bondholders will be paid in full.

It is impossible to tabulate in detail all the services performed by your petitioner during the course of this proceeding in bankruptcy. The voluntary petition was filed on August 8, 1933 and your petitioner filed on behalf of Allied [fol. 241] Owners Corporation a petition for reorganization

on June 22, 1934. During this period of ten months and a half your petitioner was constantly occupied with the details of this case. There were numberless conferences with the bankrupt's officers and with officers of the affiliated and parent companies. Your petitioner was required to examine all of the voluminous documents and contracts, the facts surrounding the execution of the documents, the examination of the law with reference to the contracts and was constantly giving advice to the officers of the debtor corporation and information to the Trustees' attorneys. Your petitioner gave information to many of the bondholders and their representatives and to the attorneys for the various committees.

Your petitioner received the sum of $5,000 on June 21st, approximately six weeks prior to the filing of the voluntary petition in bankruptcy. This sum does not adequately reimburse your petitioner for the services rendered prior to the bankruptcy proceeding in protecting the claim of Allied Owners Corporation against Paramount Publix Corporation and in connection with the preliminary defaults of Loew's Theatre & Realty Corporation.

Your petitioner requests that he be allowed the sum of Fifteen thousand ($15,000) Dollars for services rendered to the bankrupt during the continuance of the proceedings in bankruptcy and that he be paid his disbursements amounting to $34.75, which said disbursements consist of the filing fee paid to the Clerk of the United States District Court for the Eastern District of New York amounting to $30.00, the sum of $.75 paid for a certified copy of the order of adjudication and the sum of $4.00 paid for a copy of the opinion of Hon. Grover Moscowitz rendered in connection with the disqualification of one of the trustees.

[fol. 242] Wherefore your petitioner prays that notice be given to the creditors of the bankrupt estate, of this application and that he be awarded the sum of Fifteen thousand ($15,000) Dollars for services rendered as attorney for the bankrupt and the sum of Thirty-four 75/100 ($34.75) Dollars for disbursements incurred.

Dated New York, January 15, 1935.

Robert P. Levis, Petitioner.

Duly sworn to by Robert P. Levis. Jurat omitted in printing.

[fol. 243] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF BANKRUPT'S ATTORNEY UNDER GENERAL ORDER XLII

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Robert P. Levis, being duly sworn, deposes and says:

That he is the attorney for Allied Owners Corporation and is duly authorized to practice in the United States District Court for the Eastern District of New York.

Deponent states that the services set forth in the annexed petition were rendered solely for the interest of the bankrupt and in assisting the Trustees and their attorneys in the administration of the trust.

No agreement has been made, directly or indirectly, and no understanding exists, for the division of fees between deponent, the Trustees, the Bankrupt or the attorney for any of them.

Robert P. Levis.

Sworn to before me this 15 day of January, 1935.
(Sgd.) Selma Stein.

[fol. 244] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF CULLEN & DYKMAN FOR ALLOWANCE OF COMPENSATION IN BANKRUPTCY PROCEEDINGS

To the Honorable the Judges of the United States District Court, for the Eastern District of New York and the Honorable Theodore Stitt, Referee in Bankruptcy:

The petition of Jackson A. Dykman respectfully shows to this Court as follows:

I am an attorney and counsellor at law admitted to practice in this Court and a member of the firm of Cullen & Dykman, having offices at 177 Montague Street in the Borough of Brooklyn, City of New York.

On or about August 29, 1933 my firm was retained by William M. Greve, who had been elected one of three trustees in bankruptcy of the above named bankrupt. The necessity for retaining counsel was due to the fact that although William M. Greve had been unanimously elected as a trustee in bankruptcy herein at the meeting of creditors held on August 25, 1933, nevertheless the Honorable Theodore Stitt, Referee in Bankruptcy, disapproved of his election. A formal order was entered by the Referee in Bankruptcy on August 25, 1933 approving the appointment of [fol. 245] Stephen Callaghan and Percival E. Jackson as trustees in bankruptcy of the above named bankrupt but disapproving of the appointment of Mr. Greve. In the protection of the rights of Mr. Greve it became necessary for me or my associates to perform the services hereinafter set forth.

The minutes of the meetings of creditors held on August 21, 1933 and August 25, 1933 were examined and as a result thereof it was ascertained that the Referee in Bankruptcy disapproved of the appointment of William M. Greve solely on the ground that the latter had participated in the affairs and activities of Allied Owners Corporation prior to its bankruptcy and that therefore as a trustee in bankruptcy he would represent an interest adverse to the creditors. The determination of the Referee was based upon statements made by Honorable Charles H. Kelby, Receiver in Equity of New York Investors, Inc., a creditor of the bankrupt, and statements of William M. Greve made in response to questions by the Referee. I believed the order to be erroneous in the following particulars:

(a) That the Referee was without authority or jurisdiction on his own motion to disapprove the election of a trustee unanimously appointed by all the creditors of the bankrupt then present or duly represented.

(b) That the Referee erred in holding that the said William M. Greve had participated in the affairs and activities of the bankrupt to the extent that as a trustee in bankruptcy he would be representing an interest adverse to creditors.

[fol. 246] (c) That the Referee erred in holding that a trustee appointed by the unanimous choice of the creditors is disqualified as a matter of law from serving as trustee

by reason of his having participated in the affairs and activities of the bankrupt.

(d) That the Referee erred in holding that the participation in or familiarity with the affairs of a bankrupt by a single one of three trustees affects such trustee with an interest adverse to the creditors, or requires the disapproval of the appointment of such trustee.

(e) That the Referee acted arbitrarily and not in the exercise of judicial discretion in disapproving the appointment of said William M. Greve as trustee.

(f) That the action of the Referee in disapproving the appointment of William M. Greve as one of three trustees was an abuse of discretion.

On September 1, 1933 I prepared a petition for review of the Referee's order, which was verified on the same day by Mr. Greve, wherein there were set forth in detail the matters complained of. The petition was filed with the Referee in Bankruptcy who, under date of September 2, 1933, submitted to the United States District Court for the Eastern District of New York his Referee's Review Certificate. The Certificate was examined by me and I thereafter prepared a notice of motion bringing on for review the said order of the Referee in Bankruptcy as provided in General Order XXVII in an effort to obtain the approval of the election of William M. Greve as one of the three trustees in bankruptcy herein. On September 8, 1933 [fol. 247] I appeared before the District Court for the Eastern District of New York and argued before Judge Moscowitz for the confirmation of the election of Mr. Greve and a reversal of the order of the Referee in Bankruptcy. I also made an extensive examination of the law on the subject and prepared and submitted to the Court a brief outlining the cases which in deponent's view required a reversal of the Referee's order.

On September 12, 1933 Judge Moscowitz rendered a sixteen page opinion sustaining the contentions of deponent. The order of the Referee in so far as it disapproved the election of William M. Greve as co-trustee was reversed. An order was thereafter prepared by one of my associates approving the election of Mr. Greve, which order was signed by Judge Moscowitz on September 14, 1933.

On October 13, 1933 E. Johnson Cowdrey filed with the District Court for the Eastern District of New York a petition for appeal from the order of Judge Moscowitz and submitted his assignments of error, together with a petition to the United States Circuit Court of Appeals for the Second Circuit for an order granting leave to appeal to the Circuit Court of Appeals. An order to show cause was made by Circuit Judge Manton bringing on for argument on the same day the motion for leave to appeal. I appeared before the Circuit Court of Appeals in opposition to the motion for leave to appeal. The motion for leave to appeal from the order of Judge Moscowitz was denied.

On October 16, 1933 an order was made by the Referee in Bankruptcy on the petition of E. Johnson Cowdrey, verified the same date, requiring William M. Greve to show cause why he should not be removed as one of the trustees [fol. 248] in bankruptcy upon the grounds and for the reasons set forth in Cowdrey's petition and why testimony should not be taken before the Referee in Bankruptcy in support of the allegations of the petition. It therefore became necessary to examine Cowdrey's petition consisting of ten (10) pages and elicit therefrom the alleged grounds and reasons for the removal of Mr. Greve. A hearing on the order to show cause was had on October 24, 1933, at which one of the members of my firm appeared and an adjournment was taken to October 26, 1933. On the latter date I appeared before the Referee in Bankruptcy and moved for the dismissal of the petition of Mr. Cowdrey. The motion was supported by a formal notice to dismiss which I had prepared and had served on opposing counsel, wherein it was sought to dismiss the petition of E. Johnson Cowdrey upon the following grounds:

I. That the said petition fails to state facts sufficient to constitute a cause for the removal of William M. Greve as a co-trustee in bankruptcy of the above named bankrupt estate.

II. That the facts set forth in said petition are insufficient as a matter of law to justify the removal of William M. Greve as a co-trustee in bankruptcy of the above named bankrupt estate.

III. That none of the alleged causes set forth in the said petition for the removal of the said William M. Greve arose subsequent to the appointment of the said William M. Greve as co-trustee in bankruptcy of the above named bankrupt estate.

IV. That the alleged adverse interest set forth in the said [fol. 249] petition as the ground for the removal of the said William M. Greve as co-trustee in bankruptcy of the above named bankrupt estate, together with the other matters set forth in said petition, constitute issues which were previously raised and determined in this proceeding on September 10, 1933 by a decision rendered by the Honorable Grover M. Moscowitz, District Judge, holding a stated term of this Court for the hearing of motions and the said matters and issues have become and now are res adjudicata.

V. That petitioner, E. Johnson Cowdrey, is not a creditor of the bankrupt estate entitling him to institute this proceeding and no proof of claim has been filed by him or in his behalf.

At the hearing Mr. J. L. Flynn appeared for the remaining trustees and Mr. Palmer and Mr. Chess appeared for E. Johnson Cowdrey. The argument of counsel appears in ninety-seven (97) pages of minutes.

At the conclusion of the hearing the Referee in Bankruptcy denied the motion to dismiss. Deponent prepared an order denying the motion which was submitted to the Referee. The order was signed under date of October 26, 1933 formally denying the motion to dismiss the petition. The hearing was thereupon adjourned to November 9, 1933.

On October 26, 1933 deponent filed with the Referee a petition for review from the order denying the motion to dismiss. On October 30, 1933 deponent prepared an amended petition for review which was verified on the same date by William M. Greve and filed with the Referee in Bankruptcy. The amended petition and the exhibits annexed thereto consisted of more than sixty-nine (69) pages. [fol. 250] The petition for review alleged that the order

denying the motion to dismiss was erroneous in the following particulars:

I. That the Referee erred in his failure to grant the motion to dismiss the petition of E. Johnson Cowdrey, verified October 16, 1933, for the following reasons:

(a) That the said petition fails to state facts sufficient to constitute a cause for the removal of William M. Greve as a co-trustee in bankruptcy of the above named bankrupt estate.

(b) That the facts set forth in said petition are insufficient as a matter of law to justify the removal of William M. Greve as a co-trustee in bankruptcy of the above named bankrupt estate.

(c) That none of the alleged causes set forth in the said petition for the removal of the said William M. Greve arose subsequent to the appointment of the said William M. Greve as co-trustee in bankruptcy of the above named bankrupt estate.

(d) That the alleged adverse interest set forth in the said petition as the ground for the removal of the said William M. Greve as co-trustee in bankruptcy of the above named bankrupt estate, together with the other matters set forth in said petition, constitute issues which were pre-
[fol. 251] tember 12, 1933 by a decision rendered by The Honorable Grover M. Moscowitz, District Judge, holding a stated term of this Court for the hearing of motions and that the said matters and issues have become and now are res adjudicata.

(e) That petitioner, E. Johnson Cowdrey, is not a creditor of the bankrupt estate entitling him to institute this proceeding and no proof of claim has been filed by him or in his behalf.

II. That the Referee acted arbitrarily and not in the exercise of judicial discretion in denying the said motion to dismiss and the same constituted an abuse of discretion.

III. That the action of the Referee in denying the motion to dismiss was improper, erroneous and not in accordance with law.

IV. That the Referee erred in his failure to hold that said William M. Greve as one of three trustees in bankruptcy herein duly appointed by the unanimous choice of the creditors was not disqualified from serving as a co-trustee in bankruptcy herein by reason of his having participated in the affairs and activities of the bankrupt as set forth in the petition, and that such participation was not a ground for the removal of said William M. Greve.

V. That the Referee erred in his failure to hold that the [fol. 252] participation in and familiarity with the affairs of the bankrupt by the said William M. Greve as one of the three trustees, as set forth in the petition, did not affect said co-trustee with an interest adverse to creditors which would be a ground for his removal.

VI. That the Referee erred in his failure to hold that said William M. Greve was properly qualified to act as co-trustee in the above entitled bankruptcy proceeding.

VII. That the Referee erred in his failure to hold that the interests of said William M. Greve by reason of his association with affiliated companies of the bankrupt and otherwise made his appointment as co-trustee desirable.

VIII. That the Referee erred in his failure to hold that the interests of William M. Greve as set forth in the petition were not adverse to those of the creditors of the estate.

On October 28, 1933 the Referee in Bankruptcy filed with the District Court for the Eastern District of New York the Referee's Review Certificate wherein he set forth at length his reasons for denying the motion to dismiss, with a list of authorities in support thereof. With the Certificate of Review the Referee handed up the following:

(1) Petition for review;

(2) Stenographer's minutes;

(3) Order complained of;

[fol. 253] (4) Petition and order to show cause upon which the removal proceeding was based; and

(5) Exhibits submitted by me in behalf of William M. Greve.

Under date of October 31, 1933, the Referee submitted Supplemental Review Certificates substantially the same as his previous certificate.

At an adjourned first meeting of creditors on November 1, 1933, Archibald Palmer was conducting an examination against the objection of the trustees in bankruptcy. At such hearing Mr. Greve was called as a witness and was asked questions by Mr. Palmer in respect of the same matters and allegations as contained in the petition of Cowdrey to remove Mr. Greve. Accordingly it became necessary on November 1, 1933, for me to prepare and submit to the District Court for the Eastern District of New York a petition praying that the taking of testimony at any hearings in the above entitled bankruptcy proceedings in respect of the matters and allegations set forth in the petition of E. Johnson Cowdrey be stayed until the hearing and determination of the review by the District Court of the order denying the motion to dismiss. An order was signed by Judge Byers under date of November 1, 1933, requiring E. Johnson Cowdrey to show cause why the relief should not be granted. In this application it was necessary for me to prepare papers consisting of more than sixty (60) pages. I also submitted my own affidavit as to what occurred before the Circuit Court of Appeals and before the Referee in Bankruptcy.

On November 2, 1933, I brought up for review before the District Court for the Eastern District of New York the [fol. 254] petition for review from the order of the Referee in Bankruptcy denying the motion to dismiss the petition of E. Johnson Cowdrey together with the motion for an order staying the taking of testimony. The matter came on before The Honorable Mortimer W. Byers, District Judge, and was argued on November 2, 1933, by me on behalf of Mr. Greve and by Mr. Archibald Palmer in behalf of E. Johnson Cowdrey. The argument is set forth in sixty-three (63) pages of minutes.

In connection with the argument before Judge Byers, I prepared a memorandum in support of the motions and examined the memorandum in opposition submitted by Mr. Palmer.

Under date of November 8, 1933, Judge Byers sustained the Referee in Bankruptcy in denying the motion to dismiss the petition of E. Johnson Cowdrey and vacated the stay

contained in the order to show cause. Judge Byers rendered a nine (9) page opinion which I examined. Two orders were thereafter prepared and signed in accordance with the decision of the Court. Thereafter I prepared a notice of motion returnable before the United States Circuit Court of Appeals for the Second Circuit on the 11th day of December, 1933, for an order granting leave to appeal to the Circuit Court of Appeals from the order made by Judge Byers. This entailed the necessity of preparting a petition for appeal setting forth in detail the grounds for the appeal, assignments of error and petition of appeal. These consisted of eighty-seven (87) pages of typewritten matter.

I argued the motion for leave to appeal before the Circuit Court of Appeals on December 11, 1933. The motion was [fol. 255] denied. Thereafter one of my associates appeared before the Referee in Bankruptcy herein on December 14, 1933, and December 28, 1933.

In the interim I had obtained an order from Judge Byers extending the time of William M. Greve to answer the petition of E. Johnson Cowdrey until five (5) days after the date of the entry of an order by the Circuit Court of Appeals for the Second Circuit on the application of Mr. Greve for leave to appeal. Pursuant thereto, on January 11, 1934, I prepared an answer which was verified by Mr. Greve on the same date and on said date I appeared before the Referee in Bankruptcy in this matter.

In the course of the foregoing proceedings it became necessary for me and my associates to attend Referee's hearings constituting the adjourned meetings of creditors of the bankrupt.

In connection with the foregoing matters it was necessary for me to have extensive conferences with Mr. Greve and others on innumerable occasions, considerable time was consumed in the examination of cases and either I or one of my associates attended a number of hearings at the adjourned meetings of creditors, which hearings were held at the instance of Mr. Palmer.

The register sheets of my office indicate that services in connection with the foregoing matters were performed by me or one or more of my associates on the following dates:

1933

August 31. All afternoon; part of evening.
Sept. 1.
" 2. All day and evening.
[fol. 256] Sept. 5. All day.
Sept. 6.
" 4. 8 hours.
" 7. 15½ hours.
" 8. 9¼ hours.
" 12. 3 hours.
" 13.
" 14. Most of morning.
" 15.
" 28.
Oct. 13. 3½ hours.
" 14. 2 hours.
" 16.
" 17.
" 18.
" 19.
" 20.
" 21. 1 hour.
" 23.
" 24. All day until 10 P. M.
" 25. All day and until 11 P. M.
" 26. Most of day.
" 27. All day.
" 28. 2 hours.
" 30.
" 31.
Nov. 1. 10 hours.
" 2. 6½ hours.
" 6.
" 8.
" 9. Most of morning.
" 3.
" 4.
" 6.
" 10.
[fol. 257] Nov. 11.
Nov. 13. 2 hours.
" 14. All morning.
" 18. All morning and part of afternoon.

Nov. 20.
" 21.
" 22.
" 23.
" 25.
" 27.
" 28.
" 29.
" 17.
" 15.
Dec. 4. 1 hour.
" 5. 6 hours.
" 6.
" 7.
" 8. 2 hours.
" 11. 3 hours.
" 12. ¾ hour.
" 11. Most of morning.
" 14.
" 18.
" 19.
" 22.
" 23.
" 27.
" 28.

1934
Jan. 9.
" 11.
" 2.
" 3. 2¼ hours.
" 4. 1 hour.
[fol. 258] Jan. 5.
Jan. 10.
" 11. Good part of morning.
" 21.
" 22.

In view of the services rendered as set forth herein I feel that my firm is reasonably entitled to receive the net sum of $5,000 as its fee, together with disbursements necessarily incurred in this matter in the sum of $474.35, as more particularly set forth in the annexed schedule. Of this amount the sum of $889 has been paid by Mr. William

M. Greve on account of said fee and disbursements. Upon the allowance being made as sought by this petition there will be reimbursed to Mr. Greve the amount paid by him, subject to the approval of the Referee in Bankruptcy herein, upon the theory that all legal charges and disbursements in connection with the official acts of an elected Trustee in Bankruptcy should be borne by the bankrupt estate.

Wherefore, deponent respectfully requests that Cullen & Dykman be allowed the net sum of $5,000 as its fee, with disbursements in the sum of $474.35, making an aggregate sum of $5,474.35, for services rendered by it as attorneys for Mr. William M. Greve, Co-Trustee in Bankruptcy, upon the disapproval of his election and in the removal proceedings instituted by E. Johnson Cowdrey.

Dated Brooklyn, New York, January 29, 1935.

Jackson A. Dykman, Petitioner.

[fol. 259] Schedule of Disbursements

Copy of opinion	$4.00
Copies of orders	8.70
Stenographic charges, carfares, etc	184.60
Filing fees	17.55
Investigation charges	52.00
Transcript of testimony	63.00
Printing brief	125.70
Photostat copies	18.80
Total	$474.35

Duly sworn to by Jackson A. Dykman. Jurat omitted in printing.

[fol. 260] In the United States District Court

[Title omitted]

Affidavit of Jackson A. Dykman Under General Order XLII

United States of America,
Eastern District of New York,
County of Kings, ss:

Jackson A. Dykman, being dully sworn, deposes and says: I am an attorney and counsellor at law admitted to prac-

tice in this Court and am a member of the firm of Cullen & Dykman. My firm appeared as attorneys for Mr. William M. Greve in the proceedings arising out of the disapproval by the Referee of his election as co-trustee in bankruptcy and in the proceedings instituted by E. Johnson Cowdrey for the removal of Mr. William M. Greve. Neither I nor any member of my firm has made any agreement directly or indirectly and no understanding exists with the receiver, any of the trustees, the bankrupt, the debtor or the attorney of any of them for the division of any fees, allowance or compensation which may be payable to my firm as attorneys for Mr. William M. Greve, except that, if permitted by the Referee in Bankruptcy, reimbursement [fol. 261] will be made to Mr. William M. Greve for the amount advanced by him as set forth in my petition.

Jackson A. Dykman.

Sworn to before me this 29th day of January, 1935.
Frederick A. Delatour, Notary Public, Kings Co.
N. Y. 127. Comm. Expires March 30, 1936.

[fol. 262] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WILLIAM M. GREVE FILED WITH PETITION OF CULLEN & DYKMAN

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

William M. Greve, being duly sworn, deposes and says: That he is one of the trustees in bankruptcy of the above named bankrupt estate, duly qualified and acting.

A petition in bankruptcy was filed by the above named bankrupt on or about August 8, 1933, pursuant to which it was duly adjudged a bankrupt.

At the meeting of creditors on August 25, 1933, all of the creditors, including Reconstruction Finance Corporation, constituting a majority in number and amount of the creditors of the bankrupt appointed Stephen Callaghan, Percival E. Jackson and deponent trustees in bankruptcy of the above named bankrupt. At said meeting the Referee in

Bankruptcy approved the appointment of Stephen Callaghan and Percival E. Jackson, but disapproved my election solely on the ground that I had participated in the affairs and activities of the company prior to the institution of bankruptcy proceedings to the extent that as a trustee in bankruptcy I would represent an interest adverse to the creditors. It therefore became necessary for me, [fol. 263] in the protection of my rights, to employ personal counsel as distinguished from the attorneys appointed by the remaining trustees. I therefore retained Cullen & Dykman as my attorneys to act for me and in my behalf in an effort to set aside the order of the Referee in Bankruptcy, which was accomplished and my election was confirmed. I also retained said law firm to act for me in the proceedings instituted by E. Johnson Cowdrey for my removal as co-trustee in bankruptcy.

The services rendered by Cullen & Dykman are set forth with particularity in the petition of Jackson A. Dykman, submitted herewith, which services in the opinion of deponent were performed as stated and were necessary. The said petition seeks payment of counsel fee to Cullen & Dykman out of the bankrupt estate in the net sum of $5,000, plus disbursements necessarily incurred by them in this matter in the sum of $474.35. Deponent has heretofore paid to Cullen & Dykman on account of the aforesaid fee and disbursements the sum of $889, for which deponent seeks reimbursement. Deponent considers that the amount asked for in said application for an allowance is fair and reasonable.

Wherefore, deponent respectfully prays that the said application be granted.

Wm. M. Greve.

Sworn to before me this 29th day of January, 1935.
Clara J. Lampke, Notary Public, Queens County.

[fol. 264] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF HEARING ON ALLOWANCES

To the Creditors of the Above Named Bankrupt and Debtor:

Hearing will be held Friday, February 15th, 1935, at two o'clock in the afternoon at Room 727, Post Office Building, Washington and Johnson Streets, Brooklyn, N. Y., on the following allowance applications:

Stephen Callaghan, Percival E. Jackson, Wm. M. Greve, bankruptcy trustees		$142,059.96
Goldwater & Flynn, bankruptcy trustees' attorneys'		
Services	$100,000.00	
Disbursements	1,247.80	
		101,247.80
Robert P. Levis, bankrupt's attorney		
Services	15,000.00	
Disbursements	34.75	
		15,034.75
[fol. 265] Cullen & Dykman, attorneys for Wm. M. Greve, in special proceedings		
Services	5,000.00	
Disbursements	474.35	
		5,474.35
Horowitz, Farrell & Co., bankruptcy trustees' accountants		1,050.00
Matthews, Brown & Co., bankruptcy trustees' accountants		500.00
Theodore Stitt, bankruptcy referee		25,000.00
Total		$290,366.86

These applications are made pursuant to subdivision (i) of Section 77B of the Bankruptcy Act for services rendered in the bankruptcy proceeding from August 8, 1933 to June 22, 1934. Allowances for services rendered in the corpo-

rate reorganization proceeding, will be separately filed and considered in that proceeding at a later date.

Provision will be made in the final order fixing allowance herein for the payment thereof by the corporate reorganization trustees.

Dated, at Brooklyn, N. Y.
February 4th, 1935.

Theodore Stitt, Referee in Bankruptcy, 190 Montague Street, Brooklyn, N. Y.

[fol. 266] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF REFEREE IN BANKRUPTCY FOR ALLOWANCE FOR SERVICES

To the Honorable Robert A. Inch, United States District Judge:

Pursuant to paragraph (i) of Section 77B of the Bankruptcy Act as amended, I, Theodore Stitt, Referee in Bankruptcy, to whom the above entitled bankruptcy proceeding was refer-ed generally on August 8th, 1933, hereby respectfully make application for an allowance for services rendered as such Referee from August 8th, 1933, to June 22nd, 1934, at which time a debtor petition for corporate reorganization under Section 77B of the Bankruptcy Act was filed and approved.

The pertinent part of paragraph (i) of Section 77B reads as follows:

"(i) If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court, whether before or after this amendatory Act takes effect a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section and if such petition or answer is approved, the [fol. 267] trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may

deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of *such reasonable administrative expenses and allowances in the prior proceedings as may be fixed by the court appointing said receiver or prior trustee.* * * *"

The Order of this Court made June 22nd, 1934, appointing temporary trustees under Section 77B provided at Paragraph IX as follows:

"That all reasonable administrative expenses and allowances in the Bankruptcy proceeding No. 25012, which may be fixed by the Bankruptcy Court, shall constitute a charge upon the Debtor's estate, and shall be paid by the Trustees in accordance with the orders of the Bankruptcy Court without further order herein."

Section 40 (c) of the Bankruptcy Act reads:

"In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee."

The Order of this Court made July 27th, 1934, was based on the following decision handed down by your Honor, July 23rd, 1934:

[fol. 268] "It seems to me that the sensible thing is to to allow the preceeding to proceed before the learned referee who has had charge of the bankruptcy matter, but there may be certain issues which require more time and study than a referee can properly give. Accordingly, — the Act so provides, I shall send to the referee as Special Master all matters now pending except the claims of the New York Investors and any of its subsidiaries. These particular claims are sent to Oscar A. Lewis, 50 Court St. Brooklyn, as Special Master to hear and report. If it becomes necessary and important hereafter to have any claim sent to a special master other than the referee, application may be made upon showing such necessity. Also the question of any proposed reorganization plan is not hereby referred but will await further consideration of the court as to a special master- Settle Order."

From the foregoing, it appears that your Honor has the power to fix the fair and reasonable compensation of my services as Referee in the Bankruptcy proceeding.

The filing and approval of the petition under Section 77B had the effect of revoking the order of reference in the bankruptcy case bringing the matter of my compensation under Section 40, sub-section (c) of the Act.

In fixing the amount of compensation to be allowed the referee in the bankruptcy proceeding, in fairness to the debtor corporation, it would seem that the compensation in both proceedings should not exceed the amount that would have been allowed if there had been in fact only one proceeding.

[fol. 269] The report and the statement of services by the Trustees and the petition for allowance by the Trustees' attorneys indicate the scope of the administration of the estate in bankruptcy.

Meetings, hearings and examinations were held before me on forty-eight occasions, seventeen orders were signed, five reports were filed by the Trustees, six decisions in writing and Certificates were made by me. The business of the bankrupt has been conducted by the Trustees under orders made by me. All checks have been countersigned by me. The number of claims filed is 4,092.

Transcript of my Docket Book is annexed hereto.

The commissions of a referee are one-half of one percent of the amount paid to creditors in the case of a composition. In the case of regular bankruptcy administration and liquidation, commissions of a referee are one percent. This is provided in Section 40, subdivision (a) of the Act.

There is now pending before the Court the Plan of Reorganization in the Debtor reorganization proceeding. If this Plan of Reorganization is finally approved, it will mean that there will be a settlement with creditors which is comparable to a composition in a bankruptcy proceeding rather than with a liquidation of the estate.

I am informed that the Plan of Reorganization contemplates payment or future payment of all allowed claims in full.

The claims on file with me total over $19,000,000.00. There is, however, duplication in some of the claims. Some of the claims are being or are to be contested by the

Trustees. It does appear from an examination of the claims that approximately $13,540,961.59 of them are not [fol. 270] open to question and will be recognized in the Plan of Reorganization. This figure is exclusive of $3,198,384.21 of the claim of the Receivers for New York Investors, Inc. Their claim is at issue and may remain so even at the time of reorganization. The items comprising this total are as follows:

First Mortgage bondholders	$9,327,500.00
Debenture bondholders	1,813,615.41
Third Mortgage held by N. Y. Investors, Inc	501,981.10
First Mortgage, Fremont and Glens Falls	238,000.00
Second Mortgage, Fremont	25,000.00
Second Mortgage, Glens Falls	25,000.00
Notes, Prudence Co. Inc.	1,000,000.00
Notes, N. Y. Investors, Inc.	200,000.00
Notes, Thompson-Starrett Co. Inc.	409,865.08
	$13,540,961.59

A settlement by composition in bankruptcy on a basis of $13,540,961.59 would fix the Referee's fee at one-half of one percent or $67,704.81. Section 40 of the Act also provides for the payment to the Referee of 25¢ for each claim filed. On a basis of 4,092 claims, this would mean $1,023.00. This would give a total compensation to the Referee in the bankruptcy proceeding of $68,727.81. To apportion this amount equally between the bankruptcy and the Debtor Reorganization proceeding would mean $34,363.90 for services in the bankruptcy proceeding. This amount I would consider excessive. The amount which I consider would be fair and reasonable compensation for my services in the bankruptcy proceedings would be $25,000.00.

[fol. 271] Attention is called to subsection 4 of General Order 48 of the United States Supreme Court. This subsection of the General Order deals with commissions of a Referee in a Debtor proceeding by an individual. It provides for the same compensation where an extension is effected as if there had been a composition. It further provides that the Referee shall return any commissions previously received if the Debtor proceeding is unsuccessful and is followed by a liquidation. This bears out the intention on

the part of the United States Supreme Court that compensation shall be apportioned where there is more than one proceeding, as if there had been only one proceeding.

I therefore respectfully ask that your Honor fix the compensation of the Referee in this bankruptcy proceeding in the sum of Twenty-five Thousand Dollars ($25,000.00).

Dated Brooklyn, New York, February 14, 1935.

Respectfully submitted, Theodore Stitt, Referee in Bankruptcy.

Allied Owners Corporation

Transcript of Referee Stitt's Docket Book

1933.

Aug. 8. Date of adjudication.

8. Received order of ref., pet. and schedules. Indemnity to be paid when Trustee has been elected.

[fol. 272] 9. Wrote to bankrupt's attorney advising him that meeting will be held Aug. 21st, 2 p. m. Room 214, P. O. Bldg. Schedules show payment of $5,000 to bankrupt's attorney for services rendered and to be rendered.

10. Mailed and published 714 notices of first meeting, returnable 21st. Indemnity to be paid.

21. Francis T. Pender, Pres. and John A. Buckbee, Treas. sworn. Adjourned to Friday, August 25th, 2 p. m. Room 565, P. O. Bldg.

25. Hon. Stephen Callaghan and Percival E. Jackson elected Trustees, bond $100,000. Adj. to Sept. 5th, 2 p. m. P. O. Bldg. Room 565.

25. Signed order approving appointment of Hon. Stephen Callaghan and Percival E. Jackson as Trustees and directing them to file their bond in sum of $100,000 and that the election by vote of creditors of William M. Greve as Trustee is disapproved. Copy also signed.

25. Signed and filed report of first meeting without report of conformity. U. S. Fidelity & Guaranty Co. bond of Trustees approved and filed.

30. Mr. Callaghan advises by letter that he and Mr. Jackson as Trustees have opened two bank accounts; one in Brooklyn Trust, 177 Montague St., $169,032.40 and the other in Lawyers Trust, 44 Court Street $172,380.78.

1933.

Sept. 2. Received petition for review filed by William M. Greve.

[fol. 273] 2. Received petition for review filed by Thomson Starrett Company, Inc. represented by Chadbourne, Stanchfield & Levy, 25 Broadway, N. Y. C. and Salkin & Korn, 285 Madison Ave. N. Y. C.

2. Signed and filed Referee's review certificate re: disapproval of appointment of Mr. Greve as Trustee.

5. Adj. to Sept. 19 (1st mtg.)

6. Received copy of notice of motion brought by Thomson Starrett Company for review of Referee's order. Set down for Sept. 8 before the court.

6. Received copy of notice of motion brought by William M. Greve for review of Referee's order. Set down for Sept. 8 before the court.

7. Received Trustees' schedule of property.

14. Received copy of order signed by Judge Moscowitz on Sept. 14th reversing order signed by me under date of Aug. 25 and that appointment of William M. Greve as co-trustee is approved etc. Approved and filed new bond of 3 trustees.

15. Signed order that Trustees be authorized to retain Realty Associates Management Inc. as agent to collect rents in premises known as Brooklyn Paramount Theatre and office building etc. and to pay said agent 2% of gross receipts collected by them.

19. Adj. to Oct. 5th (1st mtg.)

20. Received Trustees' first report. Balance in Brooklyn Trust Co. $181,684.04, Lawyers Trust Company $214,181.77, Lawyers Trust Rent Account $13,076.07, total $408,941.88. Copy of said report to be filed.

[fol. 274] 20. Signed order authorizing Trustees to continue business as conducted by the bankrupt for a period of 60 days from date hereof and in conducting of such business to make such contracts and incur such expenses as in their discretion may be necessary.

1933.

Sept. 23. Sent bill of $76.30 to Trustees for Referee's indemnity. (Bill forwarded to Judge Callaghan).

27. Received $76.30 indemnity for first meeting.

27. Received copy of Trustee's first report.

Oct. 4. Hearing on motion for an order amending schedules set down Oct. 8. First meeting adjourned to Oct. 10.

5. First meeting adjournel to Oct. 10.

5. No appearance by respondents; motion granted; submit order and amended schedules in triplicate.

10. Adj. to Oct. 25, 10 a. m. Room 301, old P. O. Bldg.

17. Signed order to show cause vs. William M. Greve, one of the Trustees herein, why an order should not be made and entered herein removing him as such Trustee upon the grounds and for the reasons set forth in annexed petition etc. setting same down for Oct. 17.

16. Signed order amending Schedules A-2, B-3a, and B-3b in triplicate. Triplicate schedules received. Original and copy filed with the court.

17. Adj. to Oct. 24—removal proceeding.

24. Adj. to Oct. 26.

25. Adj. to Nov. 1st, 10 a. m. Room 301, P. O. Bldg.

[fol. 275] 26. Removal hearing commenced; adjournment taken pending review of ruling. Adj. to Nov. 9th.

26. Received motion of Cullen & Dykman to dismiss petition of E. Cowdrey Johnson for removal of Trustee.

26. Signed order that motion to dismiss petition of E. Cowdrey Johnson for removal of Trustee is denied.

26. Received petition for review of Referee's order (on petition to dismiss).

27. Received exhibits filed by Cullen & Dykman.

28. Signed Referee's review certificate (dismissal of Trustee).

30. Filed above report.

31. Received notice of motion of Cullen & Dykman for review of Referee's order made Oct. 24 (before the court).

1933.

Nov. 1. Adj. to Nov. 2nd, Room 7, U. S. Comm. Room, 10 a. m.

2. Adj. to Nov. 6, Room 727, 10 a. m.

6. Adj. to Nov. 8, Room 727, 10 a. m.

8. Adj. to Nov. 10, 10 a. m., Room 727 and further adj. will be to Monday, Nov. 13, 10 a. m. Room 727.

9. Adj. to Nov. 23, removal proceeding.

10. Adj. to Nov. 13, 10 a. m. and 2 p. m. Room 727 (1st mtg.)

13. Adj. to 2 p. m. today (1st mtg.)

13. Adj. to Nov. 16, 10 a. m. Room 727 (1st mtg.)

14. Signed Referee's decision on Trustee's petition to invest funds (believe that petition should be denied).

16. Signed Bar orders directing State Tax Commission and Collector of Internal Revenue to file

[fol. 276] tax claims within 30 days from date of service.

16. Adj. to Nov. 22, 2 p. m. Room 727, 3 p. m. for Mr. Ringling (1st mtg.)

21. Issued order for subpoenas on examination of Marie Denar and Emily Ringling for Nov. 22. Application made by G. & Flynn.

20. Signed order authorizing Trustees to continue business for a full period of 90 days from the date hereof and that in the conducting of such business be permitted to incur and pay such expenses as in their discretion may be necessary.

20. Received copy and original of Trustee's second report:

Balance on hand in Brooklyn Trust Co.	$187,588.30
Balance on hand in Lawyers Trust Co.	204,631.90
Balance on hand in Lawyers Trust Co. (Rent Acct.)	68,491.03
	$460,711.23

20. Received bar orders with admission of service thereon. State Tax Commission and Collector of Internal Revenue both served Nov. 20.

1933.

Nov. 20. Hearing on order to show cause vs. Halsey, Stuart & Co. for an order restraining them from paying out any of the funds heretofore placed in their hands by Allied Owners Corporation for payment of interest on account of bonds issued by Allied Owners Corporation and directing them to turn over the same to Trustees set down for Nov. 23.

[fol. 277] 22. Adj. to Nov. 27, 2 p. m. Room 727 (1st mtg.)

23. Mailed 485 notices to scheduled creditors who have failed to file claims, advising them that they must file their claims not later than Feb. 8/34.

23. Adj: to Dec. 14 (order to show cause vs. Wm. M. Greve for removal.

23. Adj. to Dec. 14 (order to show cause vs. Halsey, Stuart & Co.).

27. Adj. to Dec. 1, 2 p. m. Room 727 (1st mtg.).

Dec. 1. Adj. to Dec. 4, 2 p. m. Room 727 (1st mtg.).

4. Adj. to Dec. 6, 2 p. m. Room 727 (1st mtg.).

2. Hearing on Motion of Realty Associates, Inc. for an order directing Trustees to segregate rents, etc. set down for Dec. 5, 12 a. m. Room 705, 190 Montague St. (issues received this date).

5. Above hearing adjourned to Thursday, Dec. 7th, 2 p. m. Room 565, P. O. Bldg.

5. Adj. to Dec. 12 (order to show cause vs. Halsey, Stuart).

6. Adj. to Dec. 7, 4:15 p. m. Room 727, P. O. Bldg. (1st mtg.)

7. Adj. to Dec. 12 (Realty Associates segregation of rents) Received memorandum filed by Henry Hetkin, attorney of Realty Associates, Inc. in support of petition for segregation of rents.

7. Adj. to Dec. 13, 2 p. m. Room 727 (1st mtg.) Mr. Schenck to sign testimony Dec. 15, Room 705, 190 Montague St. at 10:30 a. m.

[fol. 278] 12. Received memorandum of Trustees' attorney on motion to direct Halsey, Stuart & Co. to turn over certain funds in their pos-

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session to the Trustees. Received answer of Halsey Stuart & Co. to motion of Trustees. Petition dismissed, stay vacated without prejudice to plenary suit.

Dec. 12. Receiver memorandum of Trustees' attorney in opposition to petition by Realty Associates Inc. for segregation of rents. Adj. to Dec. 14.

13. Adj. to Dec. 20, 2 p. m. Room 727 (1st mtg.).

13. Adj. to Dec. 20, 10:30 a. m. Room 705, 190 Montague St. (signing of testimony by Mr. Schenck).

Dec. 13. Signed order that Trustee's motion against Halsey, Stuart is denied and cross-motion of Halsey, Stuart is granted without prejudice to Trustees' right to bring plenary suit and further ordered that order dated November 20 restraining Halsey, Stuart & Co. Inc. from paying out funds be and the same is hereby vacated.

14. Adj. to Dec. 28 (order to show cause vs. Greve).

14. Submitted (Realty Associates Inc.).

18. On application of Trustees' attorneys, order signed by me Nov. 27 is modified by making order to show cause returnable Jan. 29, 1934 and date of service Jan. 19 instead of Dec. 29 and Jan. 19 respectively (copy on file—orig. returned).

[fol. 279] 18. Signed Referee's report on petition of Realty Associates Inc. for an order segregating rents of 2 theatres located at Glens Falls, New York and Fremont, Ohio, recommending that said rents be segregated, etc.

21. Filed above report.

20. Adj. to Friday, Jan. 5, 2 p. m. Room 727 (1st mtg.).

20. Testimony signed by N. Schenck; corrections noted.

22. Signed order authorizing Trustees to pay Extension Theatre Corporation $4000 for payment of expenses for operation of Brooklyn Paramount Theatre. Said sum to be paid by the Trustees out of funds deposited in Law-

1933.

yers Trust Company Rent Account; said payment to be made upon understanding that Trustees in bankruptcy of Paramount Publix Corporation advance a like amount for the same purpose.

Dec. 26. Trustees' attorneys advise that they have received all of the lists from Halsey, Stuart & Co. and other two banking houses and they are now having triplicate lists for filing prepared.

28. Trustee (Stephen Callaghan) advises by letter that list of bondholders is being prepared and one copy will be filed within a short time.

28. Adj. to Jan. 11 (order to show cause vs. Greve).

1934.

Jan. 2. Hearing held on order to show cause to modify stay dated Nov. 27, 1933, staying Manufactur- [fol. 280] ers Trust Co. as Trustee and others from taking action to foreclose. Motion granted.

2. Order signed modifying stay in order of Nov. 27 to allow Manufacturers Trust Co. to apply for permission to foreclose.

5. Adj. to Friday, Jan. 12 (1st mtg.).

8. Received supplemental list of creditors filed by Trustees' attorneys.

11. Marked off without prejudice to restoration on five days notice (order to show cause vs. Greve).

12. Adj. to Jan. 26 2 p. m., Room 727 (1st mtg.).

15. Mailed 3408 notices of adjournment first meeting advising of last day to file claims and enclosing forms of proof of claim furnished and prepared by Trustees in Bankruptcy pursuant to U. S. Supreme Court General Order 38, Form 32.

19. Mailed bill of $340.80 to Trustees in Bankruptcy for mailing of above notices.

24. Received payment of above bill for calling of adjourned first creditors meeting.

26. Adj. to Feb. 15, 2 p. m. (1st mtg.).

1934.

Jan. 25. Received original and copy of Trustees' third report, balance in Brooklyn Trust Co. $187,588.30
Lawyers Trust Co. (regular acct.) 194,440.57
Lawyers Trust Co. (segregated rent acct.) 46,109.09
Chase National Bank (regular acct.) 37,955.39
Chase National Bank (rent acct.) 47,835.66

$513,929.01

[fol. 281] First dividend cannot be declared as bankrupt has outstanding obligations of approximately $15,000,000 of which greatest portion is secured by mortgages and until there has been a determination of the disposition of the security no determination of the amount of unsecured indebtedness can be made.

Feb. 4. Hearing to be held Feb. 5 on examination of Mr. Bernstein, secretary of Loew's, by stipulation.
5. Marked off.
15. Adj. to March 1 by consent (1st mtg.).

Mar. 1. Adj. to March 15 by consent (1st mtg.).
15. Adj. to March 27.
20. Received Trustee's fourth report (original and copy). Actions pending—balances on hand as follows:

Brooklyn Trust Co.	$187,588.30
Lawyers Trust Co. (regular acct.)	193,865.81
Lawyers Trust Co. (rent acct.)	16,245.25
Chase Natl. Bank (regular acct.)	31,296.12
Chase Natl. Bank (rent acct. Fremont & Glens Falls)	9,908.27
Chase Natl. Bank (rent acct.)	91,717.03
Total of balance in estate	$530,620.78

Mar. 22. Signed order authorizing Trustee to pay out of funds of Chase National Bank (rent acct. Fremont & Glens Falls) to City of Glens Falls $2415.54 for taxes to County Treasurer of County of Sandusky, Ohio, $750.57 for taxes.

[fol. 282]

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Mar 26. Received issues in re to the matter of the value to the estate of records, books, accounts, etc., held by Alfred T. Davidson, referred to me as Referee for report by order dated March 26.

27. Appearance by Mrs. Emily Ringling excused one week; adj. to April 3.

Apr. 3. Adj. to Apr. 10.

10. Signed order authorizing Trustees to pay out of funds deposited in rent account in Lawyers Trust Co., 44 Court St., to the tax collector of Jefferson County $9000. for 1933 State and County taxes Birmingham City tax and Birmingham special school district tax and interest and penalties accrued thereon of $197.25 in all a total of $9197.25.

10. Adj. to Apr. 17.

17. Adj. to Apr. 24 (1st mtg.).

24. Adj. to May 1st (1st mtg.).

May 1. Adj. to May 8th (1st mtg.).

8. Adj. to May 15th (1st mtg.).

14. Hearing on objection to claim of Al. E. Reuben, Trustee in Bankruptcy of Publix-Ohio Corp. for $1847.42, set down for May 29th.

15. Adj. to May 29th (1st mtg.).

17. Signed order authorizing Trustees to further continue and carry on business as heretofore conducted by them under previous orders, etc.

24. Received original and copy of Trustee's fifth report. Balances:

Bklyn. Trust Co.	$187,588.30
Lawyers Trust Co. (reg. acct.)	206,250.55
Lawyers Trust Co. (rent acct.)	34,707.72
[fol. 283] Chase Natl. Bank (reg. acct.)	31,296.10
Chase Natl. Bank (rent acct. of Fremont & Glens Falls)	2,357.73
Chase Natl. Bank (rent acct.)	102,665.98
	$564,866.38

Final report cannot be filed because of uncompleted matters mentioned in said report and all of bankrupt's assets have not been liquidated.

1934.

May 29. Add. to June 12th (1st mtg.).

29. Adj. to June 12th (obj. to claim of Al. E. Reuben, etc.).

June 12. Adj. to June 26th (obj. to claim of Al. E. Reuben, etc.).

12. Adj. to June 26th (1st Mtg.).

25. On June 22, 1934, Allied Owners Corp. by Robert P. Levis, its atty. filed petition under Section 77-b. On the same day Judge Inch signed order approving petition and appointing the three bankruptcy trustees as temporary trustees and providing for a meeting July 20th at 10:30 o'clock in the morning before the Court to determine whether the temporary trustees should be made permanent. On June 23, 1934, order was made by Judge Inch permitting Emanuel M. Cohan, Max Lober and Irving Kuller, bond creditors, by their attorney, Archibald M. Palmer, to intervene.

26. Adj. to July 10th (obj. to claim).

26. Adj. to July 10th (1st mtg.).

[fol. 284]

July 10. Issues and all moving papers referred and delivered to me on March 26 returned to Judge Moscowitz by Mr. Stitt.

10. Adj. to July 24th (Publix-Ohio claim).

10. Adj. to July 24th (40th adj. mtg.).

24. Marked off at request of Trustees (Publix-Ohio claim).

24. Closed at request of Trustees.

23. Decision of Inch; J. "It seems to me that the sensible thing is to allow the proceeding to proceed before the learned referee who has had charge of the bankruptcy matter, but there may be certain issues which require more time and study than a referee can properly give. Accordingly, as the Act so provides, I shall send to the referee as Special Master all matters now pending except the claims of the New York Investors and any of its subsidiaries. These particular claims are sent to Oscar A. Lewis, 50 Court St. Brooklyn, as Special

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Master to hear and report. If it becomes necessary and important hereafter to have any claim sent to a special master other than the referee, application may be made upon showing such necessity. Also the question of any proposed reorganization plan is not hereby referred but will await further consideration of the court as to a special master. Settle order. R. A. Inch, U. S. D. J."

July 27. Judge Callaghan advises by letter that Mr. Gilkes called him on the telephone and advised him that Judge Galston and Judge Inch passed a rule requiring all checks of Trustees in debtor proceedings to be countersigned by the Clerk.

[fol. 285]

Aug. 8. Order signed July 27th by Inch J. that Theodore Stitt, one of the Special Masters, is authorized to countersign checks of Trustees.

9. Received copy of notice of appearance by Powell & Ruch, as counsel for Receivers in Equity of N. Y. Investors, Inc.

18. Received copy of order signed Aug 14th by Inch J. authorizing Trustees to pay City of Glens Falls $2063.50 for city taxes and pay County Treasurer of County of Sandusky, Ohio, $682.34 for taxes etc.

Sept. 6. Mailed 5646 notices to creditors advising them that bonds must be filed on or before Oct. 1 etc. and also Trustees' notices to creditors advising that claims may be filed under reorganization proceeding together with bonds on or before Oct. 1st.

10. Mailed bill of $564.60 to Trustees for mailing of notices to creditors as to filing of bonds and Trustees notice.

25. Received copy of order signed Sept. 21, 1934, by Inch J. and evidencing of claims of creditors be and hereby is extended to November 1, 1934, and that Trustees of Debtor cause notice of entry of this order etc. to be published

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once during the month of September, 1934, and twice during the month of October, 1934, in Brooklyn Times Union and New York Times. Copy of consent to said order by Newman & Bisco and other attorneys attached thereto.

Nov. 1. Received copy of order signed by Inch J. under date of Oct. 24th, 1934, that claim heretofore [fol. 286] filed by Reconstruction Finance Corp. in Bankruptcy proceedings be and the same hereby is referred for consideration and report to Oscar A. Lewis, 50 Court St. Bklyn. N. Y. as Special Master, and said Special Master shall report thereon in accordance with provisions of orders of this court dated July 27, 1934, and August 22, 1934.

3. Received copy of order signed November 1 by Inch J. that United States of America and State of New York and the counties therein set forth file any and all claims for taxes against the debtor or trustees as such on or before December 1, 1934, at Room 801, 190 Montague Street. Received copy of order signed Nov. 1 by Inch J. that schedules in bankruptcy heretofore filed and supplemental list of creditors filed by the Trustees, shall be deemed filed in this debtor proceeding.

[fol. 287] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

No. 25012

In the Matter of ALLIED OWNERS CORPORATION, Bankrupt

REPORT OF REFEREE IN BANKRUPTCY—Dated March 2, 1935

To the Honorable Robert A. Inch, United States District Judge:

Pursuant to the provisions of subdivision (i) of Section 77B of the Bankruptcy Act, the trustees' final report and

account and the following allowance applications have been filed with me as Referee:

Stephen Callaghan, Percival E. Jackson, Wm. M. Greve, bankruptcy trustees		$142,059.96
Goldwater & Flynn, bankruptcy trustees' attorneys'		
Services	$100,000.00	
Disbursements	1,247.80	
		101,247.80
Robert P. Levis, bankrupt's attorney		
Services	15,000.00	
Disbursements	34.75	
		15,034.75
Cullen & Dykman, attorneys for Wm. M. Greve, in special proceedings,		
Services	5,000.00	
Disbursements	474.35	
		5,474.35
[fol. 288] Horowitz, Farrell & Co., bankruptcy trustees' accountants		1,050.00
Matthews, Brown & Co., bankruptcy trustees' accountants		500.00
		$265,366.86

I transmit herewith without comment and without recommendation the petition of the Referee for compensation in the sum of $25,000.00. Although there is no provision in law for notice to creditors or hearing on compensation applied for by a referee, the same was included in the annexed notice so that creditors might have notice of all allowance applications.

Pursuant to District Rule 10 I respectfully certify:

(1) Estimated value of gross assets $14,205,996.18 which includes in cash $731,425.57.

(2) Estimated value of net assets $14,081,483.23, which includes in cash $602,912.62.

The trustees' report shows that there is in the hands of the debtor reorganization trustees as of January 28th, 1935 cash in the sum of $746,016.49.

As to (3), (4), (5) and (6) assets were transferred to reorganization proceeding without payment of dividend or allowances.

(7) Services referred to herein have not been the subject of compensation to any other person.

Pursuant further to said District Rule 10, a hearing on ten days' notice by mail to the creditors of both the bankrupt and debtor reorganization estates, as set forth in [fol. 289] the annexed certificate of mailing, was held in Room 727, Post Office Building, Washington and Johnson Streets, Brooklyn, N. Y. on Friday, February 15th, 1935, at two o'clock in the afternoon. Stenographic report of said hearing is annexed hereto.

There were mailed 3,927 notices of said hearing. There were twelve apearances in behalf of bondholders and creditors and one bondholder in person. Twenty-four letters from bondholders and bondholders representatives were received by the referee and the two bondholders' committees. The originals or copies thereof are annexed hereto.

Creditors who expressed opinion in person or by attorney at the hearing were as follows:

First Mortgage Bondholders Committee by Messrs. Sullivan & Cromwell	$4,667,000.00
Debenture Bondholders Committee by Messrs. Chadbourne, Hunt, Jaeckel & Brown	850,000.00
First Mortgage Bondholders by Messrs. Kay, Scholer, Fierman & Hayes	115,000.00
First Mortgage Bondholders by Messrs. Hays, Podell & Shulman	450,000.00
Reconstruction Finance Corporation, junior indebtedness by Messrs. Debevoise, Stevenson & Plimpton	1,600,000.00
First Mortgage Bondholders by Mr. Archibald Palmer	77,000.00
[fol. 290] First Mortgage Bondholders by Messrs. Schiff, Dorfman & Stein	11,000.00
United Presbyterian Board of Publication, First Mortgage bondholder	10,000.00
First Mortgage Bondholders by Messrs. Barry, Wainwright, Thacher & Symmers	5,000.00
Mrs. M. M. Stewart, First Mortgage Bondholder	1,000.00

The creditors were in accord that the services rendered by the trustees and attorneys were all that could be desired in that they had brought out of financial chaos a plan of reorganization beneficial to all classes of creditors.

The majority objected to the allowances asked as excessive. They suggested ad interim allowances irrespective of the exact value of the services rendered in the bankruptcy proceeding, final compensation to be fixed at such time as the plan of reorganization may be confirmed.

Two recommendations of definite amounts to be allowed ad interim were made.

Mr. Paul W. McQuillen of counsel for the First Mortgage Bondholders Committee suggested for:

Trustees jointly	$50,000.00
Trustees' attorneys	50,000.00
Bankrupt's attorney	7,500.00

Mr. R. C. Hunt of counsel for the Debenture Bondholders Committee and Mr. Fierman of Kaye, Scholer, Fierman and Hayes, expressed agreement with these figures.

[fol. 291] Mr. Francis T. P. Plimpton of counsel for Reconstruction Finance Corporation submitted the following:

Trustees jointly	30,000.00
Trustees' attorneys	40,000.00
Bankrupt's attorney	4,000.00

He qualified the foregoing, however, by stating that in no event were the trustees entitled to more than $14,628.51 for services in the bankruptcy proceeding on the basis of cash disbursed by them under Section 48 of the Bankruptcy Act.

Mr. Algase, of Hayes, Podell & Shulman, endorsed the amounts recommended by Mr. Plimpton.

At the conclusion of the hearing, I invited the submission of briefs on the question of law as to the limitations or measure of compensation to be found in the Bankruptcy Act applicable to the fixing of allowances herein. I transmit with this report memoranda submitted by Messrs. Debevoise, Stevenson and Plimpton, Mr. Robert P. Levis, Messrs. Chadbourne, Hunt, Jaeckel and Brown, Messrs. Schiff, Dorfman and Stein and Messrs. Cullen and Dykman. Their careful presentation of the questions involved has been most helpful.

I respectfully report as follows:

I have examined the final report and account of the trustees and find the same correct. I recommend that it be approved.

In addition to their report the trustees have filed a statement of services comprising 148 pages. The trustees' attorneys have submitted an allowance petition of 78 pages and also a summary of their office register.

[fol. 292] These papers reflect accurately and comprehensively the intricacy and magnitude of the services rendered by the trustees, their attorneys and the bankrupt's attorney in keeping the estate intact, conducting its extensive theatrical business and in negotiating the reorganization which Special Master Oscar A. Lewis has reported with his approval and which the trustees believe will be finally confirmed within a short time.

To appraise the beneficial value to the estate of the services of these gentlemen is not difficult. It is my judgment that the results attained could not be improved upon. The difficulty arises in arriving at the measure of compensation to be applied in view of the revolutionary changes effected in the Bankruptcy Act by the enactment of Section 77B.

The sole authority for fixing allowances for services rendered from August 8, 1933 to June 22, 1934, the period of time during which the bankruptcy proceeding was pending, is found in subdivision (i) of Section 77B, the pertinent part of which reads as follows:

"* * * the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee * * *"

If it was not for the foregoing provision, no court having jurisdiction over a prior trustee or trustees could fix allowances. Gross v. Irving Trust Co. 289 U. S. 342; Lion Bond-
[fol. 293] ing Co. v. Karatz 262 U. S. 640; Isaacs v. Hobbs Tie & Timber Co. 282 U. S. 734.

Subdivision (i) gives a court appointing a prior trustee authority to fix a reasonable allowance. When this has been done, the judge in charge of the debtor reorganization

proceeding is to make provision for the payment of the allowance, provided he, too, considers the allowance reasonable. Beyond this, I do not find any provision in the Bankruptcy Act which applies to the allowances to be made herein.

I do not agree with the view expressed by many of the attorneys at the hearing that Section 48 governs the compensation to be allowed the trustees. I do not agree for two reasons:

1. Subdivision (k) of Section 77B provides that Section 48 shall not apply unless an order of liquidation has been made.

2. Section 48 makes no provision for compensation for trustees where their services are terminated in the midst of administration by a superseding proceeding.

Section 48 has to do with maximum commissions allowable to receivers and trustees in a bankruptcy proceeding. It was enacted before debtor reorganization proceedings were even contemplated. At that time there was no other proceeding which could supersede the bankruptcy proceeding.

There is a provision in Section 48 for commissions for a receiver on property in kind transferred to the trustee. No similar provision appears for a trustee. The reason is [fol. 294] obvious. The trustee was the ultimate liquidator. There was no other court or proceeding that could succeed to the administration of the estate.

The particular provision in Section 48 which it is claimed applies to these trustees is found in paragraph (a) reading as follows:

"a. Trustees shall receive * * * such commissions on all moneys disbursed or *turned over to any person,* including lien holders, by them, * * *."

Bearing in mind that at the time Section 48 was enacted there was no other proceeding that could replace the bankruptcy proceeding and reading the entire section to grasp the general scheme of compensation provided, it is apparent that the phrase "turned over to any person" relates solely to money or property in the possession of the trustee to which the legal or equitable title subsequently is shown

to have been in some person other than the bankrupt at the time of the filing of the bankruptcy petition. In other words, the money or property in question never did belong to the bankrupt estate. This is quite different from a transfer of the right of possession and the legal title to property of an entire estate by operation of law as provided for in Section 77B, (c) (2) and (i).

The portion of Section 48 just quoted is the basis upon which the trustees have computed their commissions with the exception that they apparently have waived claim to six, four and two percent allowable as a maximum on the first ten thousand dollars, asking only for one percent on $14,205,996.18, the value of the property and the sum of [fol. 295] money transferred to the reorganization trustees, and an additional one percent for conducting the bankrupt's business as provided in Section 48 (e).

If Section 48 does apply the trustees have correctly computed the maximum amount that may be allowed them. They are entitled to compute their commissions on the value of property turned over as well as on cash disbursed. In re Toole and Henry 294 Fed. 975; in re Kessler & Co. No. 10268 Southern District of New York, unreported decision of Judge Learned Hand made July 16, 1918, a copy of which is annexed hereto.

As against the two decisions just cited, both in the Southern District of New York and by judges who now sit on the Circuit Court of Appeals, Second Circuit, there is in re Morris Bros., 8 Fed. (2nd) 629. The decision is in the District Court of Oregon and seems to be largely based on the assertion "money * * * means money." As a matter of precedent and as a matter of preference of the reasoning presented, I feel constrained to follow the two decisions cited from the Southern District of New York.

I am aware that Referee Joyce in the Southern District of New York has held to the contrary as to Section 48 in the Matter of Paramount Publix Corporation, bankrupt #56763 and that his report was confirmed by Judge Goddard in a memorandum decision dated December 10, 1934. The case is not reported. A copy of the report and decision are annexed hereto. Referee Joyce says commissions may be computed on cash only on the authority of in Re

Morris Bros., supra. He makes no reference to the decisions to the contrary in his own district.

[fol. 296] Having reached the conclusion that the allowances to be recommended must be reasonable, as provided in subdivision (i), Section 77B and are not subject to any other restriction imposed by the Bankruptcy Act, the size of the estate and the results accomplished as indicated by the treatment of creditors on the reorganization must be considered. It would also seem to be pertinent to study allowances made in other proceedings of the same nature.

The suggestion made at the hearing that ad interim allowances be recommended in excess of amounts claimed to be allowable in the bankruptcy proceeding would seem to overstep my power in this proceeding as a Referee in Bankruptcy. Furthermore I see no good reason why the fair value of services rendered in the bankruptcy proceeding cannot be finally arrived at. If this is so, ad interim allowances would merely delay reorganization administration and would render the consideration presently given to the matter more or less waste effort.

I am informed that the plan of reorganization provides for the payment or future payment of all classes of claims, the maturity date of bonds being extended and interest rate reduced.

The figures which are of primary interest in arriving at allowances are as follows:

Value of assets as estimated by trustees	$14,205,996.18
Approximate amount to be paid on reorganization as estimated by referee on basis of claims filed	13,500,000.00
[fol. 297] Cash in hands of reorganization trustees	746,016.49

The amount estimated to be paid on reorganization is questioned in the memorandum submitted by Messrs. Debevoise, Stevenson and Plimpton. They eliminate interest, quoting figures less by $200,000.00. Of course, these figures are only approximate but judging from data furnished by the trustees, the final amount when determined is more likely to exceed the estimated total.

As to other cases where allowances have been made for bankruptcy services rendered prior to a Section 77B pro-

ceeding, I have only been able to find two. Neither of them is officially reported but I have obtained and annex copies of the reports and decisions. They are only partially helpful in arriving at reasonable allowances. In both cases the court has fixed allowances under Section 48 on a percentage of the cash disbursed. There is no finding that the amounts computed are reasonable. Undoubtedly they were not considered excessive because the court had the power under Section 48 to allow less than the maximum. But whether they were considered inadequate or less than reasonable does not appear. Under Section 48 no discretion may be exercised and there is no remedy to be applied where the maximum provided is inadequate.

In the Southern District of New York in the Paramount Publix Corporation Bankruptcy #56763 allowances have been made in a similar situation. The referee's report and Judge Goddard's decision, previously referred to, are annexed hereto.

The value of that estate was said to be $149,000,000.00; [fol. 298] cash disbursed by the trustees totalled $4,865,000.00. First there was an equity receivership for four months. Then there was bankruptcy for fourteen months. This was followed by debtor reorganization under Section 77B.

Referee Joyce's report shows that the administration of the bankrupt estate involved many other corporations and the operation of motion picture houses in many parts of the country. There was extensive litigation and a large staff of lawyers employed. The volume of work and the extent of services was greater than in this bankruptcy. It cannot be assumed that the problems and responsibilities shouldered by the trustees were more momentous or more difficult of solution. This could only be ascertained after extended hearing and inquiry.

One of the two equity receivers was allowed $20,000.00 for the four months devoted to that proceeding. The receivers' attorneys received $75,000.00 on account. In the bankruptcy, the three trustees were allowed $97,500.00, computed at the rate of one percent on cash disbursed and an additional one per cent for conducting business. The attorneys for the trustees received $175,000.00 on account.

There is one other proceeding that has come to my attention where allowance was made to a referee for services in bankruptcy succeeded by a 77B proceeding. It is in re Labolt & Co., Northern District Court of Illinois, Bankruptcy #55997, Reorganization #56413, reported in Bankruptcy Law Service of Commercial Clearing House Inc. Loose Leaf Service Division of the Corporation Trust Company at Page 1137, division #3026. A copy of the Referee's Report affirmed by the Court Sept. 20, 1934 is annexed hereto.

[fol. 299] In that proceeding there were no trustees. The referee was also special master on reorganization. The sum of $480,000.00 was paid to creditors. The referee was allowed one half of one percent of that amount or $2,400.00 and expenses. It was stated that $1,200.00 applied to bankruptcy services and the remaining $1,200.00 as special master's fees on reorganization.

Conclusions

If it is held that the trustees are entitled to commissions under Section 48 on money and property turned over not to exceed one percent and an additional one percent for conducting business, commissions should be computed as follows:

1% of $14,205,996.18	$142,059.96
Additional 1% for conducting business	142,059.96
2)	284,119.92
One half for bankruptcy services equally apportioned between the three trustees	142,059.96

I would consider this maximum to be more than reasonable compensation. It would be grossly excessive. It is to be noted that the amount recommended by me as reasonable at the foot of this report is less than half of the maximum above computed.

If it is held that the trustees are entitled under Section 48 to a maximum on cash only turned over, commissions should be computed as follows:

[fol. 300] 1% of $731,425.57	$7,314.25
Additional 1% for conducting business	7,314.25
2)	14,628.50
One half for bankruptcy services apportioned equally between the three trustees	$7,314.25

I would consider this maximum to be less than reasonable compensation almost to the extent of constituting a denial of compensation.

The foregoing computations illustrate the futility of attempting to arrive at reasonable allowances by arithmetic under Section 48.

Bankruptcy administration deals principally with cash whether by settlement or by liquidation and distribution. Corporate reorganization is primarily concerned with scaling down overhead and carrying charges so that indebtedness in whole or in part may be met on a deferred plan. Obviously Section 48 was never intended to provide for compensation for effecting a reorganization where immediate cash payments to creditors are negligible.

I believe the framers of Section 77B were conscious of this situation when they suspended Section 48 and specified that compensation was to be "reasonable" and stopped there.

I find and recommend reasonable compensation for the trustees, their attorneys, and the bankrupt's attorney, for services rendered in the bankruptcy proceeding to be as follows:

The trustees, to be equally apportioned	$60,000.00
[fol. 301] Messrs. Goldwater & Flynn, trustees' attorneys, services	75,000.00
Robert P. Levis, bankrupt's attorney, services	10,000.00

Cullen & Dykman Application

This firm represented William M. Greve, one of the trustees, in connection with my disapproval of his appointment by creditors and later appeared for him on the petition of a creditor asking for his removal as trustee. My disapproval of the appointment was reversed and the re-

moval proceeding was abandoned. Mr. Greve's services as trustee have contributed more to the beneficial results attained in the reorganization of the estate than those of any other officer or attorney connected with its administration. Without minimizing the value of services rendered by others, it is true that he was eminently equipped for the work of reorganization by reason of his familiarity with the affairs of the corporation before bankruptcy.

No order of retention was obtained in connection with the services rendered by Messrs. Cullen & Dykman. Mr. Greve was not a trustee at the time he employed these attorneys. He had merely been selected by unanimous vote of the creditors present. His appointment had been disapproved by me. He had not qualified as trustee. Objection is made to an allowance by reason of the provisions of General order 44. This order regulates appointment of "attorney for a receiver or a trustee". The retention here was not made by Mr. Greve as trustee for he was not a trustee at the time.

In the Matter of Realty Associates Securities Corp., 6 Fed. Supp. 549, Judge Galston made an allowance to an [fol. 302] attorney who represented one of the receivers in a proceeding for his removal. There was a nunc pro tunc order of retention there. Judge Galston said that he would have denied any allowance, except for the order referred to. He pointed out that General Order 44 had not been complied with.

In that case the client was a receiver when he retained the attorney. Mr. Greve in this proceeding had no official standing when he hired his lawyers. He was merely the unanimous choice of creditors.

I think that General Order 44 does not apply to this retention (as to the services rendered in connection with the disapproval of appointment). I recommend that an allowance in the sum of $2,000.00 for services in the disapproval of appointment proceeding and $474.35 for disbursements be fixed to be paid as an administration expense in view of the admitted beneficial result of the services rendered. It has been held that fees are allowed to attorneys for trustees not by authority of any specific provision of the Bankruptcy Act but as administration expenses. Matter of Wallace, 14 Fed. (2d) 539 (D. C. Okla.).

Accountants' Services.

The applications of Horowitz, Farrell & Co. and Matthews, Brown & Co. for accounting services rendered to the trustees are within the maximum fixed in the orders of retention and are approved by the trustees. I recommend their allowance.

Summary

I respectfully recommend pursuant to subdivision (i) of Section 77B the following allowances which I find to be [fol. 303] reasonable in amount for the services rendered in the bankruptcy proceeding from August 8th, 1933 to June 22nd, 1934:

Stephen Callaghan, Percival E. Jackson, Wm. M. Greve, bankruptcy trustees		$60,000.00
Goldwater & Flynn, bankruptcy trustees' attorneys'		
Services	$75,000.00	
Disbursements	1,247.80	
		76,247.80
Robert P. Levis, bankrupt's attorney,		
Services	$10,000.00	
Disbursements	34.75	
		10,034.75
Cullen & Dykman, attorneys for Wm. M. Greve, in special proceedings,		
Services	2,000.00	
Disbursements	474.35	
		2,474.35
Horowitz, Farrell & Co., bankruptcy trustees' accountants		1,050.00
Matthews, Brown & Co., bankruptcy trustees' accountants		500.00
Total		$150,306.90

I further recommend that the said amounts be ordered paid pursuant to said subdivision (i) of Section 77B, the notice of hearing dated February 4th, 1935 and annexed

hereto, and the order of this court made June 22nd, 1934 appointing temporary trustees under Section 77B reading at Paragraph IX as follows:

"That all reasonable administrative expenses and allowances in the Bankruptcy Proceeding No. 25012, which may be fixed by the Bankruptcy Court, shall constitute a charge upon the Debtor's estate, and shall be paid by the Trustees [fol. 304] in accordance with the orders of the Bankruptcy Court without further order herein."

Dated at Brooklyn, New York, March 2nd, 1935.
Respectfully submitted, Theodore Stitt, Referee in Bankruptcy.

[fol. 305] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

In the Matter of ALLIED OWNERS CORPORATION, Bankrupt

March 8, 1935.

MEMORANDUM

INCH, *J.*:

Referee's report on allowances in the bankruptcy proceeding. The Referee has given careful attention to the various applications. Due notice in accordance with the Bankruptcy Act was given and the Referee has duly considered the objections. Under such circumstances I am inclined to follow the recommendations of the learned and experienced Referee.

I agree with him that when the petition under 77-B was duly filed and the court took possession of the assets for the purpose of attempting and, in this case, apparently a successful rehabilitation of the debtor rather than its liquidation, that every demand upon the funds of the debtor must be considered in the light of what is reasonable compensation and its effect upon any plans submitted whether such compensation has been fixed by some other court in some previous proceeding or might otherwise be considered proper under the law applicable to such other proceeding. [fol. 306] Therefore with the exception of the allowances to the Trustees of $60,000, representing $20,000, each I be-

lieve the findings of the learned Referee should be sustained.

As to these allowances to the Trustees, taking into consideration the undisputed facts, the amount involved, the responsibility incurred and the very successful work done by them as reflected in the now hoped for successful plan of rehabilitation, I believe that $90,000, would be reasonable and fair compensation under all the circumstances.

Accordingly, as so amended, the report is confirmed and notice by publication to the creditors and the stockholders should be given of the proposed payment of these sums by the Trustees.

Submit order.

Robert A. Inch, U. S. D. J.

[fol. 307] In United States District Court, Eastern District of New York

In Bankruptcy. No. 25012

In the Matter of Allied Owners Corporation, Bankrupt

In Proceedings for Reorganization of a Corporation. No. 26503

In the Matter of Allied Owners Corporation, Debtor

Order of Inch, J., of March 11, 1935, Fixing Allowances of Trustees in Bankruptcy, et al.

The application of

(a) Stephen Callaghan, Percival E. Jackson and William M. Greve, Trustees of Allied Owners Corporation in the above entitled bankruptcy proceedings, and

(b) Messrs. Goldwater & Flynn, attorneys for said Trustees, and

(c) Robert P. Levis, attorney for Allied Owners Corporation, and

(d) Cullen & Dykman, attorneys for William M. Greve, in special proceedings, and

(e) Horowitz, Farrel & Co., and Matthews Brown & Co., accountants for said bankruptcy trustees

[fol. 308] for compensation for services rendered in the said bankruptcy proceedings and, in the case of the said attorneys, for disbursements made therein having been duly filed, and notice of the hearing for the consideration thereof having been duly given in accordance with the provisions of the National Bankruptcy Act as amended, and such hearing having been duly held before the Referee in bankruptcy, and the said Referee having heard argument in support of such applications and in opposition thereto, and having duly filed his report with respect thereto, and the Court having determined that the allowances to Messrs. Goldwater & Flynn, Robert P. Levis, Cullen & Dykman, Horowitz, Farrel & Co., and Matthews Brown & Co., recommended in such report are fair and reasonable and that the said recommendations should, therefore, be confirmed, and the Court having further determined that the allowances to the said Trustees recommended in the said report should, under all the circumstances of the case, be increased, and the Court being fully advised in the premises, it is

Ordered:

1. That Stephen Callaghan, Percival E. Jackson and William M. Greve, Trustees of Allied Owners Corporation in the above entitled bankruptcy proceedings, be and they hereby are allowed the sum of Ninety Thousand ($90,000.00) Dollars for services rendered in the said bankruptcy proceedings, to be equally apportioned among them.

2. That Goldwater & Flynn, attorneys for the said Trustees be and they hereby are allowed the sum of Seventy-five [fol. 309] Thousand ($75,000.00) Dollars for services rendered in the said bankruptcy proceedings and One Thousand Two Hundred Forty-Seven and 80/100 ($1,247.80) Dollars for disbursements made therein.

3. That Robert P. Levis, attorney for Allied Owners Corporation be and he hereby is allowed the sum of Ten Thousand ($10,000.00) Dollars for services rendered in the said bankruptcy proceedings and Thirty-four and 75/100 ($34.75) Dollars for disbursements made therein.

4. That Cullen & Dykman, attorneys for William M. Greve in special proceedings be and they hereby are allowed the sum of Two Thousand ($2,000.00) Dollars for services rendered in such special proceedings and Four

Hundred Seventy-four and 35/100 ($474.35) Dollars for disbursements made therein.

5. That Horowitz, Farrel & Co., accountants for the said Trustees be and they hereby are allowed the sum of One Thousand and Fifty ($1,050.00) Dollars for services rendered in the said bankruptcy proceedings.

6. That Matthews Brown & Co., accountants for the said Trustees be and they hereby are allowed the sum of Five Hundred ($500.00) Dollars for services rendered in the said bankruptcy proceedings.

Dated Brooklyn, New York, March 11th, 1935.

Robt. A. Inch, U. S. D. J.

[fol. 310] In United States District Court, Eastern District of New York

In Bankruptcy. No. 25012

In the Matter of Allied Owners Corporation, Bankrupt

In Proceedings for Reorganization of a Corporation. No. 26503

In the Matter of Allied Owners Corporation, Debtor

Order of Inch, J., of March 11, 1935, Fixing Allowance of Referee in Bankruptcy

Theodore Stitt, Esq., Referee in the above entitled bankruptcy proceedings, having duly made application for services rendered therein, and notice of the said application having been sent to all the creditors and stockholders of Allied Owners Corporation, and the Court having determined that the allowance prayed for in the said application is fair and reasonable, and the Court being fully advised in the premises,

Ordered:

That Theodore Stitt, Esq., Referee in the above entitled bankruptcy proceedings, be and he hereby is allowed the sum of Twenty-five Thousand ($25,000.00) Dollars for services rendered in the said bankruptcy proceedings.

Dated Brooklyn, N. Y., March 11, 1935.

Robt. A. Inch, U. S. D. J.

[fol. 311] In United States District Court, Eastern District of New York

In Proceedings for Reorganization of a Corporation. No. 26503

In the Matter of Allied Owners Corporation, Debtor

Order of Inch, J., of March 11, 1935, Directing Payment of Allowances for Bankruptcy Services

An order having been duly made and entered in the office of the Clerk of this Court on March 11, 1935, allowing to Theodore Stitt, Esq., Referee in Bankruptcy, the sum of Twenty-five Thousand ($25,000) Dollars; and an order having been duly made and entered in the office of the Clerk of this Court on March 11th, 1935, allowing to Stephen Callaghan, Percival E. Jackson and William M. Greve, Trustees in Bankruptcy of Allied Owners Corporation, the sum of Ninety Thousand ($90,000) Dollars for services rendered by them in the bankruptcy proceedings of the said corporation heretofore had and entitled "In the Matter of Allied Owners Corporation, Bankrupt, In Bankruptcy No. 25012"; and allowing to Goldwater & Flynn, Esqs., attorneys for the said Trustees, the sum of Seventy-five Thousand ($75,000) Dollars for services rendered in the said bankruptcy proceedings and the sum of One Thousand Two Hundred Forty-seven and 80/100 ($1,247.80) Dollars for their disbursements incurred therein; and allowing to Robert P. Levis, Esq., attorney for the said bankrupt, the sum of Ten Thousand ($10,000) Dollars for services and [fol. 312] Thirty-four and 75/100 ($34.75) Dollars for disbursements in said proceedings; and allowing to Cullen & Dykman, Esqs., attorneys for William M. Greve, in special proceedings, the sum of Two Thousand ($2,000) Dollars for services and Four Hundred Seventy-four and 35/100 ($474.35) Dollars for disbursements; and allowing to Horowitz, Farrell & Company, accountants for the said Bankruptcy Trustees, the sum of One Thousand and Fifty ($1,050) Dollars for services rendered in said proceedings; and allowing to Matthews Brown & Company, accountants for said Bankruptcy Trustees, the sum of Five Hundred ($500) Dollars for services rendered in said proceedings;

And the Court having determined that such allowances are reasonable and equitable and should be paid; and the Court being fully advised in the premises; it is

Ordered:

1. That Stephen Callaghan, Percival E. Jackson and William M. Greve, Trustees of the Debtor herein, be and they hereby are directed to make the following payments:

(a) To Theodore Stitt, Referee in Bankruptcy, the sum of Twenty-five Thousand ($25,000) Dollars;

(b) To Stephen Callaghan, Percival E. Jackson and William M. Greve, the sum of Ninety Thousand ($90,000) Dollars, to be equally apportioned among them;

(c) To Goldwater & Flynn the sum of Seventy-six Thousand Two Hundred Forty-seven and 80/100 ($76,247.80) Dollars;

[fol. 313] (d) To Robert P. Levis the sum of Ten Thousand Thirty-four and 75/100 ($10,034.75) Dollars.

(e) To Cullen & Dykman the sum of Two Thousand Four Hundred Seventy-four and 35/100 ($2,474.35) Dollars;

(f) To Horowitz, Farrell & Company the sum of One Thousand and Fifty ($1,050) Dollars;

(g) To Matthews Brown & Company the sum of Five Hundred ($500) Dollars.

Said payments to be made March 21st, 1935.

2. That Stephen Callaghan, Percival E. Jackson and William M. Greve, Trustees of the Debtor herein, cause a notice in the form hereunto annexed to be published on the 14th day of March, 1935 in the New York Times, a newspaper having a general circulation in the City of New York, and in Brooklyn Daily Eagle, a newspaper having a general circulation in the Borough of Brooklyn, City of New York, N. Y.

Dated Brooklyn, N. Y., March 11th, 1935.

R. A. Inch, U. S. D. J.

[fol. 314] *NOTICE, ANNEXED TO ORDER OF MARCH 11, 1935

To all Creditors and Stockholders of Allied Owners Corporation, Debtor.

Please take notice, that by order duly made and entered in the office of the Clerk of the United States District Court for the Eastern District of New York March 11th, 1935, fees and allowances have been fixed and ordered to be paid by the Trustees on March 21st, 1935, to the following:

(a) Stephen Callaghan, Percival E. Jackson and William M. Greve, Trustees of the Bankrupt;

(b) Goldwater & Flynn, attorneys for said Trustees;

(c) Robert P. Levis, attorney for the Bankrupt;

(d) Cullen & Dykman, attorneys for William M. Greve, in Special Proceedings; and

(e) Horowitz, Farrell & Co., and Matthews Brown & Co., accountants for the Trustees in Bankruptcy.

Dated New York, March 11th, 1935.

Stephen Callaghan, Percival E. Jackson, William M. Greve, as Trustees of Allied Owners Corporation, Debtor.

[fol. 315] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

In Bankruptcy. No. 25012

In the Matter of ALLIED OWNERS CORPORATION, Bankrupt

In Proceedings for Reorganization of a Corporation. No. 26503

In the Matter of ALLIED OWNERS CORPORATION, Debtor

ORDER TO SHOW CAUSE OF INCH, J., DATED MARCH 20, 1935, FOR ORDER VACATING ORDERS OF MARCH 11, 1935

On the annexed petition of the Reconstruction Finance Corporation, verified the 20th day of March, 1935, and on

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* The above notice was duly published on March 14, 1935, in The New York Times and in Brooklyn Daily Eagle, and Affidavits of such publication were duly filed.

(a) the order dated March 11, 1935 (a copy of which is annexed hereto) made by Judge Inch in "In the Matter of Allied Owners Corporation, Bankrupt" (In Bankruptcy, No. 25012) and "In the Matter of Allied Owners Corporation, Debtor" (In Proceedings for Reorganization of a corporation, No. 26503) allowing to Stephen Callaghan, Percival E. Jackson and William M. Greve, Trustees in Bankruptcy of Allied Owners Corporation, the sum of $90,000 for services rendered by them in the above entitled bankruptcy proceedings, and allowing, inter alia, to Gold-[fol. 316] water & Flynn, attorneys for the said Trustees, to Robert P. Levis, attorney for said Corporation, to Cullen & Dykman, attorneys for said William M. Greve, the sums therein specified.

(b) the order dated March 11, 1935 (a copy of which is annexed hereto) made by Judge Inch in said bankruptcy proceedings and in said reorganization proceedings, allowing to Theodore Stitt, Referee in said bankruptcy proceedings, the sum of $25,000, and

(c) the order dated March 11, 1935 (a copy of which is annexed hereto) made by Judge Inch in said reorganization proceedings directing the Trustees of the said Debtor in said reorganization proceedings to make payment on March 21, 1935 of the allowances referred to in the above mentioned two orders,

and on the papers and proceedings upon which said three orders were granted, and upon all the proceedings heretofore had in said bankruptcy proceedings, and in said reorganization proceedings,

Now, on motion of Debevoise, Stevenson & Plimpton, attorneys for the petitioner, it is hereby

Ordered, that Stephen Callaghan, Percival E. Jackson and William M. Greve, Trustees of Allied Owners Corporation, Debtor, Goldwater & Flynn, attorneys for the said Trustees, Robert P. Levis, attorney for Allied Owners Corporation, Cullen & Dykman, attorneys for William M. [fol. 317] Greve in special proceedings, and Theodore Stitt, referee in bankruptcy, show cause before me at a Term of this Court to be held in Room 312, of the United States Court House, 271 Washington Street, Borough of Brooklyn, New York City, on the 29th day of March, 1935, at

10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made and entered herein vacating and setting aside the said three orders of Judge Inch, dated March 11, 1935, revising the allowances made therein to said Stephen Callaghan, Percival E. Jackson and William M. Greve, to said Goldwater & Flynn, to said Robert P. Levis, to said Cullen & Dykman, and to said Theodore Stitt by reducing such allowances to legal and reasonable amounts, on the ground that the said allowances so made are in all cases excessive and exorbitant and were not fixed in accordance with the applicable sections of the Bankruptcy Act and the applicable General Orders; and it is hereby further

Ordered that, pending the return of this order to show cause herein and the hearing of this motion and until further order in the premises, the Trustees of the Debtor herein, Stephen Callaghan, Percival E. Jackson and William M. Greve, be stayed from any and all action under and from making the payments directed by the said order of Judge Inch made on March 11, 1935 in "The Matter of Allied Owners Corporation, Debtor"; and it is hereby further

[fol. 318] Ordered that service of a copy of this order to show cause, together with the petition thereto annexed, on said Goldwater & Flynn, attorneys for said Trustees, on said Robert P. Levis, on said Cullen & Dykman and on said Theodore Stitt, on or before March 22, 1935, shall be deemed good and sufficient service thereof.

Dated New York, March 20, 1935.

(Sgd.) R. A. Inch, U. S. D. J.

[fol. 319] IN UNITED STATES DISTRICT COURT

In Bankruptcy. No. 25012

In Proceedings for Reorganization of a Corporation. No. 26503

[Titles omitted]

PETITION OF RECONSTRUCTION FINANCE CORPORATION OF MARCH 20, 1935

To the Honorable, the Judges of the United States District Court for the Eastern District of New York:

The petition of Reconstruction Finance Corporation respectfully alleges as follows:

1. Your petitioner is a corporation duly organized and existing under and by virtue of the Act of Congress approved January 22, 1932, as amended.

2. Your petitioner is the holder, as pledgee, of

(a) an aggregate of $1,200,000 principal amount of overdue notes of the above named bankrupt and debtor,

(b) a bond and third mortgage of the above named bankrupt and debtor in the face amount of $825,000 (present [fol. 320] unpaid principal amount stated to be approximately $490,000), secured by a third lien on five theatres of said bankrupt and debtor, and

(c) all the capital stock of said bankrupt and debtor.

Proofs of claim in respect of such notes and bond and third mortgage have been duly filed herein by your petitioner.

3. This petition is made in support of a motion to vacate and set aside three orders made by Judge Inch on March 11, 1935, in the above entitled proceedings and to revise the allowances made and provided by said orders, and particularly the following allowances:

Theodore Stitt, Referee in Bankruptcy		$25,000.00
Stephen Callaghan, Percival E. Jackson and William M. Greve, Bankruptcy Trustees		90,000.00
Goldwater & Flynn, Bankruptcy Trustees' Attorneys		
Services	$75,000.00	
Disbursements	1,247.80	
		76,247.80
Robert P. Levis, Bankrupt's Attorney		
Services	$10,000.00	
Disbursements	34.75	
		10,034.75
Cullen & Dykman, Attorneys for William M. Greve, in Special Proceedings		
Services	$2,000.00	
Disbursements	474.35	
		2,474.35

[fol. 321] 4. Applications were filed with the Referee, Theodore Stitt, for allowances, inter alia, as follows:

Stephen Callaghan, Percival E. Jackson and William M. Greve, Bankruptcy Trustees		$142,059.96
Goldwater & Flynn, Bankruptcy Trustees' Attorneys		
Services	$100,000.00	
Disbursements	1,247.80	
		101,247.80
Robert P. Levis, Bankrupt's Attorney		
Services	$15,000.00	
Disbursements	34.75	
		15,034.75
Cullen & Dykman, Attorneys for William M. Greve, in Special Proceedings		
Services	5,000.00	
Disbursements	474.35	
		5,474.35

Pursuant to notice given by said Referee a hearing on said applications was held on February 15, 1935. Objections to said allowances were made on behalf of your petitioner and on behalf of virtually all of the creditors represented at such hearing. At the request of the Referee a memorandum setting forth the objections of your petitioner was

presented to the Referee. Thereafter the Referee made and filed his report, dated March 2, 1935, in which he recommended, inter alia, allowances in the above entitled bankruptcy proceeding as follows:

Stephen Callaghan, Percival E. Jackson and William M. Greve, Bankruptcy Trustees		$60,000.00
[fol. 322] Goldwater & Flynn, Bankruptcy Trustees' Attorneys		
Services	$75,000.00	
Disbursements	1,247.80	
		76,247.80
Robert P. Levis, Bankrupt's Attorney		
Services	$10,000.00	
Disbursements	34.75	
		10,034.75
Cullen & Dykman, Attorneys for William M. Greve, in Special Proceedings		
Services	$2,000.00	
Disbursements	474.35	
		2,474.35

On the same day the Referee also transmitted to the Court his petition for compensation in the sum of $25,000 for his services in said bankruptcy proceedings.

5. Thereafter and on March 11, 1935, the first of the orders herein objected to was made by Judge Inch in both the bankruptcy proceedings and the reorganization proceedings (a copy of said order being annexed hereto), in which the Court recited that the allowances to the said bankruptcy trustees should be increased, and made the allowances to said trustees and to counsel specified in the foregoing paragraph 3 of this petition. On the same day, namely, March 11, 1935, an order (a copy of which is annexed hereto) was made by Judge Inch in the bankruptcy and reorganization proceedings allowing the sum of $25,000 to said Referee, Theodore Stitt, in the bankruptcy proceedings. Thereafter and on March 11, 1935, an order (a copy of which is annexed hereto) was made by Judge Inch, [fol. 323] in the reorganization proceedings, directing the reorganization trustees to pay the above mentioned allowances on March 21, 1935. No notice of application for any of such three orders has been given to your petitioner or,

as your petitioner is informed and verily believes, to any other creditor of Allied Owners Corporation.

Allowance to Bankruptcy Trustees

6. No allowances should be made to the bankruptcy trustees at this time except reasonable interim allowances. The creditors represented at the hearing before the Referee took the virtually unanimous position that only moderate and reasonable interim allowances should be made. The allowances made are final and are clearly in excess of reasonable interim allowances.

The bankruptcy proceedings and the reorganization proceedings are in fact one proceeding, which is not yet completed and which, until completed, cannot furnish any adequate basis for a proper appraisal of the services of the Trustees in relation to the final results obtained.

Although a plan of reorganization has been negotiated, the proceedings with respect thereto are not complete, and there is no assurance whatsoever that the plan will be accepted by the requisite number of creditors. It is entirely possible that the plan may not be consummated, and that liquidation of the debtor may eventually prove necessary, an eventuality which would vitally affect a proper appraisal of the services rendered by the Trustees prior to June 22, 1934. If the plan is not consummated, much of the work [fol. 324] done by the Trustees prior to June 22, 1934, will prove to have been of small value to the estate, since, without the consummation of the plan, the Loew settlements partially negotiated by the Trustees prior to June 22, 1934, will fall through.

The policy of Congress in favor of postponing compensation until eventual results are obtained is clearly indicated by Sections 48(d) and 48(e) with reference to the compensation of receivers and marshals, whose compensation in respect of property turned over in kind by them to the trustees is not computed until moneys are realized thereon by the trustees.

7. The allowance is in excess of the legal maximum permitted under Section 48 and 72 of the Bankruptcy Act. Section 48(a) in effect provides that commissions to bankruptcy trustees shall not exceed 1% "on all moneys disbursed or turned over to any person, including lienholders, by them." For the conduct of the business the trustees

are entitled to additional compensation limited, in effect, to 1% on "moneys disbursed or turned over to any person, including lienholders, by them."

In the instant case, moneys disbursed and turned over by the Trustees to any persons were only $731,425.57, indicating legal maximum commissions for the bankruptcy trustees, as such, of approximately $14,628.50.

The Referee's report is in error in holding that subdivision (i) of Section 77B removes all restrictions on the compensation of bankruptcy trustees except that such compensation must be "reasonable." There is no indication whatsoever in such subdivision (i) that Congress intended to enlarge in any way the powers of bankruptcy courts to [fol. 325] allow compensation. It should be noted that the main emphasis of the clause in question is on the power of the 77B judge to protect obligations of the prior receiver or trustee. Furthermore, the word "reasonable" was obviously inserted for the sole purpose of permitting the 77B court to have some check over the compensation allowed by state and other federal courts to receivers, bankruptcy trustees, etc. This is shown by the fact that the word "reasonable" is omitted in the second sentence of such subdivision (i) where the 77B judge is given power to protect the payment of administration expenses and allowances in the 77B proceedings in case of a transfer to another court.

The Referee's report is also in error in holding that subdivision (k) of Section 77B has the effect of removing the restrictions of Section 48 from bankruptcy allowances. Such subdivision (k) merely provides that Section 48 shall not apply to 77B proceedings unless such proceedings involve a liquidation. Such subdivision (k) contains no provision whatsoever that Section 48 shall not apply to the fixing of allowances in prior bankruptcy proceedings by the bankruptcy court.

The Referee's report is further in error in holding that, if Section 48 does apply, the bankruptcy trustees are entitled to maximum commissions based on the value of the property turned over by them as well as on the "moneys" disbursed or turned over by them. Such an interpretation is a direct contradiction of the language of the statute, which is restricted to "moneys". The cases of In re Toole & Henry, 294 Fed. 975, and In re Kessler & Co. (No. 10268,

S. D. N. Y., unreported, July 16, 1918), cited by the Referee in support of his holding, are clearly distinguishable. The [fol. 326] later decisions in In the Matter of Paramount Publix Corporation (unreported, S. D. N. Y., December 10, 1934), and In re Morris Bros., 8 Fed. 2d) 629, should be followed.

8. Even if full allowances are to be granted at this time, and even if Section 48 of the Bankruptcy Act does not apply, the allowances are very substantially in excess of proper compensation for the services of the bankruptcy trustee to June 22, 1934, in violation of Section 44½ (Section 3 of the Act of June 7, 1934) of the Bankruptcy Act.

It must be remembered that all of the allowances in question are in respect of the approximately ten months' period ending on June 22, 1934. At that date negotiations for the Loew settlement agreements had not been consummated, the Paramount negotiations were far from completion, and only the most tentative of reorganization plans had been worked out. The main business accomplishment of the Trustees during such period appears to have been the negotiation of temporary leasing arrangements with respect to four of the theatres. Most of the balance of the work done by the Trustees appears to have reached only a tentative stage by June 22, 1934, or to have involved legal proceedings largely directed and conducted by the Trustees' counsel. No specification of the aggregate time spent by the Trustees appears in their application.

In view of the foregoing, and the express declaration of Congressional policy set forth in Section 44½ (Section 3 of the Act of June 7, 1934), it is clear that under all the circumstances the Referee's recommendation of $60,000 compensation (let alone the judge's allowance of $90,000) is excessive and exorbitant.

[fol. 327] 9. The allowance to the Trustees recommended by the Referee has been raised by the Judge from $60,000 to $90,000, or 50%, without further hearing or notice. It is respectfully submitted that a full hearing should be accorded to creditors before any of the allowances recommended by the Referee are increased. This is particularly true since the creditors, at the hearing before the Referee, were practically unanimous in objecting to anything but interim allowances, and were not heard on the point of what allowances should be made, in the light of services rendered, in

case final allowances for the bankruptcy period were to be made.

Allowance to Trustees' Counsel

10. No allowance should be made to the bankruptcy trustees' counsel at this time except a reasonable interim allowance. Everything that has been said above in paragraph 6 hereof with respect to the impropriety of making anything but interim allowances to the bankruptcy trustees, applies with equal force to allowances to the bankruptcy trustees' counsel.

11. If a final allowance is to be made at this time, the proposed allowance is substantially in excess of proper compensation for the services rendered to June 22, 1934. The proposed allowance of $75,000 for 4500 hours of work amounts to over $16 an hour, despite the fact that over 3000 of the 4500 hours were stated to have been spent by associates. Any such figures are obviously substantially out of line with proper compensation for uncompleted work car- [fol. 328] ried on in large part by associates, and must be considered to be "excessive and exorbitant" within the meaning of the above mentioned Section 44½.

Allowance to Bankrupt's Attorney

12. No allowance should be made to the bankrupt's counsel at this time except a reasonable interim allowance. The reasons given under paragraph 6 above apply with equal force to the bankrupt's attorney as well as to the Trustees.

13. Even if a full allowance is to be granted at this time, the proposed allowance is very substantially in excess of proper compensation for the services rendered to June 22, 1934, in violation of the above-mentioned Section 44½. The application of the bankrupt's attorney gives no indication of the amount of time spent by him. In view of this fact, and in view of the fact that the services as outlined in the application are largely of a character such that their value cannot be determined until the end of the reorganization proceedings, it is submitted that an allowance of $10,000 is excessive and exorbitant within the meaning of Section 44½.

Allowance to Cullen & Dykman

14. No allowance can legally be made to Cullen & Dykman for their special services as counsel to William M.

Greve for the reason that they were not properly appointed upon order of the Court as required by General Order XLIV. Even if it be considered that William M. Greve was technically not a trustee at the time the services were performed, the public policy expressed in General Order XLIV applies to the situation.

[fol. 329] 15. Even if General Order XLIV is considered not to apply, in equity a trustee whose appointment has been challenged should pay his own counsel fees, since the special proceedings are primarily the personal concern of the individual in question.

16. Even if it be considered that the expenses are payable by the estate, the proposed allowance appears excessive in relation to the services rendered. The counsel in question have failed to specify the amount of time spent by them in the matter; in the absence of this necessary fact, it is submitted that the $2,000 allowance is improper.

Allowance to Referee

17. The proposed allowance of $25,000 appears greatly in excess of the value of the services to the estate. Not only does this appear true in the light of a careful examination of the Referee's petition, but also in the light of the Congressional policy as set forth in Section 44½.

18. The proposed allowance has been made without according notice or hearing to creditors. It seems clearly just that creditors and other interested parties should be accorded an opportunity to be heard on the question.

General Considerations

19. In the above mentioned Section 44½ (Section 3 of the Act of June 7, 1934) Congress expressed a clear and recent warning against excessive and exorbitant allowances, and stated that the conservation and preservation of assets and the interests of the creditors should constitute the paramount considerations to be taken into account by the courts in the fixing of allowances.

[fol. 330] The proposed allowances herein, covering only a preliminary 10-month stage of the proceedings as a whole, excluding disbursements, aggregate $203,550. It is submitted that the allowance of such an extremely large sum

is in direct contradiction of the Congressional enactment and of public policy.

20. No previous application for the relief herein sought has been made.

Wherefore, your petitioner prays that an order be entered vacating and setting aside the three orders of Judge Inch, dated March 11, 1935, hereinabove referred to, and revising the allowances made therein to said Stephen Callaghan, Percival E. Jackson and William M. Greve, to said Goldwater & Flynn, to said Robert P. Levis, to said Cullen & Dykman, and to said Theodore Stitt, by reducing the said allowances to legal and reasonable amounts, and staying the Trustees of the Debtor herein in the reorganization proceedings from making any of the payments directed by any of said orders of Judge Inch, and for such other, further and different relief as to this Court may seem just and proper.

Dated March 20, 1935.

Reconstruction Finance Corporation, by (Sgd.) Jerome Thralls, Special Representative. Debevoise, Stevenson & Plimpton, Attorneys for Petitioner, 20 Exchange Place, New York, N. Y.

[fol. 331] *Duly sworn to by Jerome Thralls. Jurat omitted in printing.*

[fol. 332] IN UNITED STATES DISTRICT COURT

No. 25012

No. 26503

[Title omitted]

CERTIFICATE OF REFEREE AS TO NOTICES

To the Honorable Judges of the United States District Court for the Eastern District of New York:

I, Theodore Stitt, Referee in Bankruptcy in charge of the above entitled proceeding, hereby certify as follows:

On February 4th, 1935, a copy of the annexed notice of allowance hearing to be held February 15th, 1935, was

mailed by me to all creditors and stockholders of the bankrupt and of the debtor whose claims had been duly filed.

On February 15th, 1935, the said hearing was held.

On March 5th, 1935, my report as Referee on said allowance applications dated March 2nd, 1935, was filed with the Clerk of the Court. At the same time, my application for allowance as Referee was separately filed.

[fol. 333] On March 5th, 1935, a copy of my said allowance report was mailed to all creditors, stockholders or representatives thereof, who appeared at the said allowance hearing with the exception of Mrs. M. M. Stewart, owner of a $1,000.00 First Mortgage Bond, of Philadelphia, Pennsylvania, who failed to give a mailing address at the hearing.

I have examined the records of the Clerk of the Court and find that no exceptions were filed to the said report.

On March 8th, 1935, the Honorable Robert A. Inch, the Judge of this Court in charge of these proceedings, handed down his decision dated March 8th, 1935.

On March 11, 1935, three Orders were signed by the said Judge fixing the allowance and providing for the payment thereof in accordance with the said decision.

Dated at Brooklyn, New York, March 26th, 1935.

Respectfully submitted, Theodore Stitt, Referee in Bankruptcy.

[fol. 334] IN UNITED STATES DISTRICT COURT

In Bankruptcy. No. 25012

In Proceedings for Reorganization of a Corporation. No. 26503

[Title omitted]

AFFIDAVIT OF ROBERT P. LEVIS, VERIFIED MARCH 28, 1935

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Robert P. Levis, being duly sworn, deposes and says:

I am the attorney for Allied Owners Corporation.

I filed on behalf of the corporation a voluntary petition in bankruptcy in the office of the Clerk of the United States

District Court for the Eastern District of New York on the 8th day of August, 1933.

I also filed on behalf of the corporation, on June 22, 1934, a petition for reorganization of the Debtor.

I acted as the attorney for the Bankrupt throughout the entire bankruptcy proceeding. The case was one of extreme difficulty, involving the rights of creditors whose [fol. 335] claims aggregated in excess of $13,000,000 and involved property rights of values in excess of this sum; and these various properties were in turn involved in the bankruptcy of Paramount Publix Corporation, the breaches of contract by Loew's Realty & Improvement Company, the repudiation of obligations of John Ringling, and practically all the assets were subject to legal entanglements.

It is not the purpose of this affidavit to detail the character of the services performed. They were summed up by the Referee in his report and none of the parties present at the hearing at which the various applications for allowance were presented questioned the extreme value of the services and the satisfactory way in which they were performed for the benefit of the creditor body.

The efforts of the Trustees in Bankruptcy, which are set forth in detail in their petition, were terminated by the filing of the petition for reorganization and upon the approval of the petition by the District Judge the title, management and control of all of these assets passed to the Trustees appointed by the court in the reorganization proceedings.

The Debtor presented its plan for reorganization and the consideration of the plan was referred to the Hon. Oscar A. Lewis as Special Master. The Special Master held extended hearings after notice had been forwarded to all creditors of the terms of the plan, which carried with it an agreement of settlement of the litigations with the Loew Realty & Improvement Corporation and Loew's, Inc.

The Special Master recommended the approval of the plan with modifications accepted by the Debtor and upon notice to all creditors and stockholders the report of the Special Master approving the plan was brought on for [fol. 336] hearing before the Hon. Robert A. Inch, United States District Judge, and the said District Judge has confirmed the report of the Special Master, has approved the plan and has directed that an order confirming the Plan

be entered upon the obtaining of the necessary signatures of creditors.

At the hearing before the court on the application to approve the plan, no objection was made to the plan so far as the consideration to be paid to stockholders and creditors was concerned. The only objection urged was a difference among certain of the creditors as to the internal management of the corporation after it was reorganized and involved solely the question of the powers and method of selection of directors after the new reorganized corporation began to function.

The court has found the plan feasible and fair for the best interests of creditors and stockholders and has found that it complies in all respects with the requirements of Section 77-B.

The report of the Trustees and the various applications for allowance were filed with the Referee in Bankruptcy and notice was given to all creditors and stockholders of a hearing upon the applications, which notice set forth the amount that was applied for in each case. The Referee has correctly reported the statements made by the creditors who attended the meeting either in person or by their representatives:

"The creditors were in accord that the services rendered by the Trustee and attorneys were all that could be desired in that they brought out of financial chaos a Plan of Reorganization beneficial to all classes of creditors."

[fol. 337] The Referee rendered his report approving the accounts of the Trustee and recommending the allowances, on March 2, 1935 and all persons who attended the hearing before the Referee were served with copies of the Referee's report at the time it was rendered, except Mrs. M. M. Stewart, a creditor for $1,000, who left no forwarding address to which notice could be sent.

This report of the Referee, served upon every party present, including the Reconstruction Finance Corporation, remained on the files of the Clerk of the United States District Court without the filing of any exception and on March 11 the District Court entered its order approving the Trustees' final account and awarding the allowances.

The Referee in Bankruptcy strictly complied with Rule X of the Rules of the Eastern District of New York, and

in compliance with Rule XXII gave written notice of the filing of his report to all the parties and their attorneys, except to the one creditor, Mrs. M. M. Stewart, who stated she was from Philadelphia, but who gave to neither the Referee nor the official stenographer any address.

No other creditor except the Reconstruction Finance Corporation has filed any exception or objection to the report of the Referee in Bankruptcy and no other creditor has made application to modify or vacate the orders entered by this Court on March 11, 1935.

I am filing herewith a certificate of the Honorable Theodore Stitt, Referee in Bankruptcy, setting forth the various proceedings which are material to the present application.

The moving papers do not challenge any of the facts [fol. 338] found by the Referee. The moving papers object only to conclusions of law so far as the allowances decreed to the Trustees are concerned, and so far as the attorneys' allowances are concerned, the objection is limited to the Court's determination as to the value of the services.

The moving papers are incorrect in the statement of paragraph 18, that the proposed allowance to Honorable Theodore Stitt was made without according notice or hearing to creditors. The notice to creditors set forth that the Referee requested an allowance of $25,000 for services as Referee in Bankruptcy. The order of this Court made on June 22, 1934 provided:

"that all reasonable administration expenses and allowances in the bankruptcy proceeding No. 25012 which may be fixed by the bankruptcy court, shall constitute a charge upon the Debtor's estate and shall be paid by the Trustees in accordance with the orders of the Bankruptcy Court, without further order herein."

This provision of the order has remained unchallenged from the time it was made up to the time of this application and this provision authorized the payment of the allowances without the entry of any order in the reorganization proceedings. Despite that fact an order was entered directing the payment in the reorganization proceedings on March 11, 1935 and all three of the orders entered upon that day were served upon the attorneys for all the intervening parties, with notice of the entry of the order.

All parties have had ample notice of every proceeding taken.

[fol. 339] Wherefore deponent prays that the application to vacate the three orders entered upon March 11, 1935, be denied.

Robert P. Levis.

Sworn to before me this 28th day of March, 1935. Selma Stein, Notary Public, New York County. N. Y. Co. Clk's No. 358, Reg. No. 6S773. Kings Co. Clk's No. 310, Reg. No. 6533. Commission Expires March 30, 1936.

[fol. 340] In United States District Court

[Title omitted]

Referee's Certificate, Dated April 16, 1935

To the Honorable Robert A. Inch, United States District Judge:

By petitions and order to show cause, Reconstruction Finance Corporation and Betty Finkelstein ask that three orders fixing allowances for services in bankruptcy proceedings be vacated and the allowances revised by reducing the same.

This certificate is in answer to that part of the petitions referring to the allowance of $25,000.00 made to the Referee.

Reconstruction Finance Corporation Petition

Reference to the Referee's allowance is made in paragraph "17" and "18" at page 10 and reads as follows:

"17. The proposed allowance of $25,000.00 appears *greatly in excess of the value of the services to the estate.* Not only does this appear true in the light of a careful examination of the Referee's petition, but also in the light of the Congressional policy as set forth in Section 44½.

[fol. 341] "18. The proposed allowance has been made *without according notice or hearing to creditors.* It seems

clearly just that creditors and other interested parties should be accorded an opportunity to be heard on the question."

There is little that I can say in answer to the allegation that the allowance is greatly in excess of the value of the services. In my application, I pointed out that under the Bankruptcy Act I would be entitled to more than $25,000.00 but that I considered the reasonable amount to be $25,000.00. Judge Inch confirmed my opinion by making the allowance in the sum of $25,000.00. In making the application and in arriving at the amount asked, I had the benefit of almost twelve years as a Referee in Bankruptcy in recommending allowances in bankruptcy proceedings.

As against this, Jerome Thralls special representative of the Reconstruction Finance Corporation gives it as his opinion that the allowance is greatly in excess of the value of the services. The extent of his experience in bankruptcy proceedings does not appear. During all of the administration of this estate he has never appeared before me nor has his name come to my attention up to the time that the instant petition was filed. In the verification of his petition he states that "his knowledge is derived from a study of certain of the papers hereinabove referred to and from statements made to him by counsel for said petitioner." A Mr. Fleming of the office of the attorneys for the petitioner herein called at my office shortly before the allowance hearing was held and examined my application. I have no knowledge of any other representative of the petitioner or its attorney who have even read my application.

[fol. 342] The statement contained in paragraph "16" that the allowance has been made without according notice or hearing to creditors is contrary to the record. All creditors received notice of my application and of the hearing on my application held February 15th, 1935. In addition to this, copy of my report on allowances was sent to this petitioner at the time the same was filed with the Clerk of the Court. This petitioner filed no exceptions to my report or my allowance application filed with the Clerk of the Court. This notice was given to creditors notwithstanding the fact that there is no provision in law for notice to creditors with reference to the allowance of a Referee

in Bankruptcy. I am therefore in accord with the statement of the petitioner that it is clearly just that creditors should be accorded an opportunity to be heard on the question of a Referee's allowance.

Betty Finkelstein Petition

Although this petition is said to be that of Betty Finkelstein and E. Johnson Cowdrey, it is signed and verified only by Betty Finkelstein. As it does not appear that said Betty Finkelstein has any authority to act for the said E. Johnson Cowdrey, it would seem that it should be considered only as the petition of the former. My files as Special Master on claims shows that the said Betty Finkelstein is presently the owner of bonds in the sum of $6,000.00.

It appears from the annexed abstract from my files that Betty Finkelstein has bought and sold Allied bonds. Her address is given as Room 1707, 270 Madison Avenue, New York City, which appears to be the offices of her attorneys. [fol. 343] E. Johnson Cowdrey has on file a claim in the sum of $515.00 based on a bond.

The portion of the petition referring to my allowance is contained in paragraph "12" and reads as follows:

"12. The allowance of $25,000.00 to Hon. Theodore Stitt, Referee, is erroneous, likewise as the amount of said allowance is considerably in excess of a fair allowance to said Referee. It is to be remembered that we are dealing with a matter that is charged with a great and extensive public interest. The creditors and persons interested are great in number and far flung. The great majority of them are unable to, or do not, have proper personal representation here. With the great losses visited upon bondholders and particularly, having in *in* mind the attitude of Congress, as expressed in Section 3 of the Act of June 7, 1934, prohibiting excessive or exorbitant compensation, and urging the conservation of the interests of the creditors, it is submitted that an allowance of $25,000.00 to a referee in bankruptcy for an estate which was neither administered through his office nor compounded or settled through his office, is highly excessive. Undoubtedly, the Referee was kept busy during the ten-month period of administration, but it will be seen that the time was devoted primarily to the examinations of witness, removal proceedings, and other

proceedings in connection with the conservation of the estate. There having been no liquidation or composition before the Referee, the amount of the allowance to him should be substantially reduced."

[fol. 344] Petitioner states that my allowance is erroneous and considerably in excess of a fair allowance. She does not state the sources of her knowledge or indicate the extent of her familiarity with the proceeding or the services rendered. She has never been before me in this proce-ding to my knowledge and her name comes to my attention for the first time in connection with the instant petition. I can only refer to my statement in connection with the Reconstruction Finance Corporation petition in answer to what she alleges.

The statement appears that the estate was not administered through my office. The record is to the contrary. The estate was administered through my office between the dates for which the compensation is fixed.

Dated Brooklyn, New York, April 16th, 1935.

Theodore Stitt.

[fol. 345] Abstracts from Files of Referee, Annexed to Referee's Certificate

Betty Finkelstein, no address shown, filed a claim covering First Mortgage bonds Nos. M1565, M1566, M5493, M5488, for $4,120.00 on February 2, 1934. Power of Attorney, Schiff, Dorfman & Stein, 270 Madison Avenue, New York City.

Bond No. M5488 assigned to James W. Maitland, c/o Bonbright & Co., 25 Nassau Street, New York City, on April 21, 1934.

Bonds Nos. M1565, and M1566, assigned to E. E. Quantrell, 15 Broad Street, New York City, on April 21, 1934.

Bond No. M5493 assigned to Sidney Skidell, 37 West 28th Street, New York City, on April 21, 1934.

Claim of Robert M. Currens assigned to Betty Finkelstein on bonds Nos. M246, M247, and M3748. (Assignment shows Assignee's address as Room 1707, 270 Madison Avenue, New York City.)

Claim of Bankers Trust Co. Exec. etc. assigned to Eddy & Co., assigned to Betty Finkelstein on bonds Nos. M16, M19, M20, M21, M22, M23.

Bond No. M23 assigned to Gerstley & Sunstein, 213 So. Broad Street, Phila., Pa. December 10, 1934.

Bonds Nos. M16, M19 and M22, assigned to Isaac Gerstley, surviving Trustee for Jane G., Charles G. and Leon Sunstein, Jr., 213 So. Broad Street, Phila, Pa., December 10, 1934.

Claim of Commonwealth Trust Co., assigned to Gruntal & Co., assigned to Betty Finkelstein, on bond No. 1874.

[fol. 346] IN UNITED STATES DISTRICT COURT

No. 25012

No. 26503

[Title omitted]

AFFIDAVIT OF TRUSTEES IN BANKRUPTCY, VERIFIED APRIL 19, 1935

STATE OF NEW YORK,
County of New York, ss:

Stephen Callaghan, William M. Greve and Percival E. Jackson, being duly sworn, depose and say:

We are the trustees in bankruptcy of Allied Owners Corporation. We are also the trustees under Section 77b. We make this affidavit in opposition to the application of the Reconstruction Finance Corporation to reduce the allowances heretofore made by the court to us for our services as such trustees in bankruptcy.

We make this affidavit in order that the record may clearly and succinctly disclose the bases upon which we contend that the allowances, as fixed, are reasonable in amount. For that purpose we attempt to briefly state the factual matters upon which such determination is properly made.

[fol. 347] The time which has fairly and properly been used in dealing with the case is amply demonstrated in the

statement of services made by the trustees and which forms part of the record. A mere reading of this statement, however, is not entirely adequate to indicate the time actually consumed. It should be supplemented by pointing out that the trustees' services were of a character that were generally non-delegable, with the result that personal time, attention, and the exercise of personal discretion and responsibility was almost invariably required.

At the same time each of the trustees maintained a separate office and a separate office organization and a scrutiny of the services rendered indicates that the individual and personal services of the trustees for the period were complemented by the devotion of each of their business organizations, and that the services for which allowance has been made, include the overhead expense of the organizations of the respective trustees, for which no separate charge was made, including clerical and stenographic hire, rent, telephone service, postage and the other usual and incidental expenses of the maintenance of a business organization.

The matters in question were pressing; they admitted of no delay and were invariably of a character that required constant and assiduous attention without regard to time of day or the pressure of other engagements. Particularly was this so when the trustees in bankruptcy were seeking recognition by the other parties aligned in opposition to the interests of the junior and unsecured creditors. A good deal of time was spent at various times during the night and week-ends were almost continuously occupied by [fol. 348] one or more of the trustees, particularly during the period when foreclosure seemed imminent and the chances of prevention by reorganization, remote.

The quality of skill which the situation demanded for the protection of the interests of the junior and unsecured creditors and the stockholders may fairly be stated as being of the most exacting. The situation into which the trustees found themselves injected at the outset was precarious in the extreme. The secured creditors were wholly in command of the situation. The trustees represented no one but unsecured creditors. The corporate trustee was pressing for summary relief and its attitude was concurred in and supported by the bondholders' committee. There was no apparent equity in the property for the junior creditors that would seem to justify recourse to the bankruptcy rules

to stay foreclosure. The trustees had no apparent power or authority. The defaults, of which the secured creditors sought to take advantage, resulted from the default of the bankrupt's debtors. There was no incentive for the defaulting debtors to negotiate with the trustees in bankruptcy. On the contrary, every opportunity for negotiation with the defaulting debtors was open to the corporate trustee and to the committee representing the secured creditors. The logical approach for the secured creditors was foreclosure with ultimate dealing for the benefit solely of the secured creditors. Foreclosure also served the legal purposes of the defaulting debtors as their default gave rise to the default of the bankrupt which gave the corporate trustee and bondholders' committee the opportunity to take command of the situation.

[fol. 349] From the standpoint of the unsecured creditors and the junior lienors, the situation was well nigh hopeless. The estate faced utter dispersal.

The skill employed in meeting that situation is evidenced by a comparison of this situation with the ultimate result and consideration of the means by which such results were achieved.

The interests with which the bankruptcy trustees and their counsel were dealing stood high in the financial and industrial world. They were skilled and forceful and were represented by able counsel. They were committed to a policy which they conceived to be in the interests of the prior lien creditors, regardless of the result to the juniors. The existing statutes and policy gave the juniors no protection—while the Hobbes decision was in the books—the Rock Island decision had not been written and there was no Section 77b of the Bankruptcy Act in existence.

Had the bankruptcy trustees and their counsel performed their duties, not in any mere perfunctory fashion, but in a manner compatible only with their official duties, there would have been no criticism of them, but complete liquidation would undoubtedly have followed. Had it not been for the standing, skill and qualifications of the trustees and their counsel, they would have been, as they were for a considerable time, completely ignored by the dominant secured creditors and their representatives. It was only because of the skill and experience in such matters of the bankruptcy trustees and their counsel, their personal acquaintance-

ships, their friendships, their contacts, their familiarity with the avenues of approach in such financial and legal matters, their ability to avail themselves of such means of [fol. 350] approach, their ability to defeat and checkmate the attempted rapprochement of the other two factors in the situation, that the trustees, and ultimately through them, the junior lienors, the secured creditors, and as the negotiations ultimately successfully developed, the stockholders, finally became recognizable factors in the situation and their interests were ultimately recognized and finally realized upon.

The amounts involved and the corresponding risks which the client ran and the commensurate risks of the trustees representing the junior lienors and the unsecured creditors, are now easily to be discerned. The Reconstruction Finance Corporation which holds notes of the bankrupt and its stock as collateral security for loans made by it to The Prudence Company, Inc. and which is therefore interested as the successor of an unsecured creditor and as stockholder, is the only objectant of substance. Foreclosure, so imminent at the beginning, would have resulted in a complete destruction of its rights and the rights of other unsecured creditors, as well as of the junior lienors, and besides, would have left the secured creditors claiming a deficiency as against what unsecured assets there were. The interests of the $1,750,000 of second mortgage bondholders were in jeopardy, besides unsecured claims of $1,600,000, and the equities represented by the stock of the corporation. At the time the bankruptcy trustees took title to the assets, the rights of these creditors and stockholders were of negligible value. As a result of the services rendered by the bankruptcy trustees and their counsel, the unsecured creditors and the junior lienors should realize one [fol. 351] hundred cents on the dollar, and the stock, a substantial equity. These are the amounts that were involved in this litigation and the risks which the clients were running and the commensurate responsibilities of their representative.

In addition, the secured creditors, regardless of the former opinion of the corporate trustee, would have suffered material loss had their representatives been successful. The foreclosure would have put the defaulting debtors in a far more favorable position respecting the evasion of their

obligations, would have jeopardized the motion picture franchises, and ultimately, through State Court foreclosure, would have left the secured creditors with possible untenanted theatres at a time when motion picture theatres were a drug on the market. Unquestionably, the prior lienors would have been in a far less enviable position than at the present time when they are to receive bonds equivalent to 100% of their claims, and secured by readjusted claims which are acknowledged and will brook no legal or other denial in the future, had the bankruptcy trustees been unsuccessful in preventing a sale of these assets in State Court proceedings.

The amounts here involved, which will be wholly recouped by the creditors, include $9,125,000 of first mortgage bonds, as well as the aforesaid items of $1,750,000 of second mortgage bonds, unsecured claims in excess of $1,600,000, and the stock equities.

The amounts owed by the defaulting debtors, which were denied and in serious jeopardy when the bankruptcy trustees took possession, were a total of $22,617,028.12, exclusive of interest and unpaid taxes, the latter of which items [fol. 352] ran to some $600.00. Of this, Loew's owed a balance of $10,897,260.42, exclusive of interest and taxes, and Paramount an unpaid balance of $11,719,767.70, exclusive of interest and taxes.

The amounts of these claims are not mere figures for the Loew claim has been settled by an agreement to pay $12,875,000 over a somewhat longer period of time, while the Paramount claim is being compromised by receipt of $5,000,000 of Paramount Publix securities, said to be worth par, the ratification of the purchase of the Birmingham Theatre by the reorganized Paramount company for $1,000,000, by the payment of $150,000 in cash, by the lease for twenty years of the Glens Falls and the Fremont Theatres for a total rental in excess of $500,000, and by the leasing of the theatre portion of the Brooklyn Paramount Theatre and Office Building at a rental of $100,000 a year for a period of twenty years, making a total for the period of $2,000,000, at the end of which time a contract has been made to sell the building for $1,500,000.

This is the value of the estate which was at stake. At the outset Paramount and Loew's both denied liability, Paramount claiming that it was liable only as a lessee and

it is to be noted that the then existent bankruptcy act gave no claim to a landlord against a lessee upon a defaulted lease. Loew's denied liability because of the defaults, the impending foreclosure, the inability to give title and the consequent impending breach, and its pleadings in the actions brought to enforce its liability were of such a nature as to deny legal attack, leaving factual questions for determination, with the usual risks of law suits. The tangible theatre assets were subject to defaulted mortgages and un- [fol. 353] paid taxes which the moneys on hand and the moneys available could not possibly meet.

The result of the negotiations initiated in the bankruptcy proceedings by the bankruptcy trustees and conducted by them and their counsel has been a reorganized company which should pay its obligations one hundred cents on the dollar, yielding to its stockholders, represented by the intransigeant Reconstruction Finance Corporation, a very considerable sum of money, none of which would otherwise have been realized by it.

This, it is apparent, was no ordinary administration of assets. It was a situation wherein the bankruptcy trustees could have performed their official duties fully and but a comparatively negligible sum would have been realized for the objecting Reconstruction Finance Corporation, either in its capacity as an unsecured creditor or as a stockholder. It might well be noted that there was no cooperation from the Reconstruction Finance Corporation during the difficult and dangerous periods of the administration of this Estate, and it gave no support to the attitude and efforts of the trustees and their counsel. It was only after the precarious times had passed and after the situation had been put in tangible and workable shape and this Estate had been created by the efforts of the bankruptcy trustees and their counsel, that the activity of the Reconstruction Finance Corporation became apparent.

The trustees in this proceeding were handling these matters on a purely contingent basis. With nothing realized, their work would have been fruitless and had their efforts been of no avail, their compensation would have been proportionate. No matter how much work had been done; no [fol. 354] matter how much skill had been brought to bear; no matter how much time and patience the bankruptcy trustees gave, an inability to bring sufficient pressure on the

corporate trustee and the bondholders' committee, a lack of knowledge or skill on the part of the trustees and their counsel in dealing and ultimately checking the summary action of the corporate trustee, their inability to hold the defaulting debtors in check until they had impeded the destructive action of the corporate trustee, and the trustees would have given most of their time, labor and skill practically without remuneration.

On the other hand, having salvaged the substantial properties which will now go to the unsecured creditors and the junior lienors and the stockholder, effort is made which, in the judgment of deponents, would avoid the making of proper and fair compensation to the trustees.

The standing of the trustees, their experience, their skill and their qualifications are matters which they cannot themselves be expected to elaborate. Suffice it to say that the three trustees include two lawyers and a business man, each of mature age and of ripe legal experience, and skilled in matters of business and finance. One of them, Stephen Callaghan, served for eighteen years on the Bench, of which fourteen were as a member of the New York Supreme Court, and with that exception he has, since 1897, been actively engaged in trial, appeal and counsel work and in the active conduct of a law practice, in the course of which he has been accustomed to receiving substantial remuneration.

The second of the trustees, William M. Greve, has been engaged in real estate and financial enterprises of importance since 1901. He has been an officer and director in ap- [fol. 355] proximately twenty companies. He has been the President of a company which, with its subsidiaries, did a business amounting to approximately $90,000,000 a year; its combined earnings exceeding $5,000,000 in some years. He has been the recipient of large personal earnings and has arranged and consummated transactions involving millions of dollars, upon which the profits have run to proportionate figures. During 1933 he performed the principal part of services in connection with the mortgage and real estate matters involving the affairs of the Bank of the United States, for which one of the corporations with which he was connected received in excess of $150,000 from the State Banking Department.

The third of the trustees, Percival E. Jackson, is a lawyer who has been actively practicing law since 1912 and who, since 1919, has specialized in bankruptcy and reorganization work and who is likewise accustomed to receiving substantial remuneration for his services and who has received a considerable number of what may be considered substantial fees and allowances in bankruptcy, equity and reorganization proceedings.

Each of the trustees maintains his own office, maintaining a clerical and stenographic force, which has been partly devoted to this matter, and the expenses of which he has personally paid and for which he has made no claim for reimbursement.

The personal and individual responsibilities of the trustees are factors that should not be overlooked. The trustees were compelled to use their judgment and discretion in passing upon matters of very considerable moment and have handled large sums of money, maintaining bank [fol. 356] balances of hundreds of thousands of dollars. They have been called upon to make disbursements running into the hundreds of thousands of dollars. They have been called upon to exercise their judgment respecting matters upon which they might have been held responsible, for negligence, inattention or even possible lack of judgment, in large sums of money. Such responsibilities are not lightly assumed, nor lightly avoided.

For the information of the court, and as a standard, it may be noted that in this State the Surrogate's Court act allows commissions to executors, administrators, guardians or testamentary trustees amounting to 2% of all moneys received and paid out, including the value of any real or personal property received, distributed or delivered. Where the gross value of the trust or estate amounts to $100,000 or more, each of the executors, administrators, guardians or testamentary trustees up to three, are entitled to an individual commission. In addition, where the trustee or executor collects rents and manages real property, he is allowed to and may retain 5% of the amount of rent collected therefrom. That is also the rate regularly allowed State Court Receivers in foreclosure and other State Court similar proceedings.

This is mentioned as indicative of the policy of the State. In this connection it is to be noted that in the case of decedents' estates simple administration is usually required, without extraordinary difficulties or complications. Assets are not usually created or conserved by proceedings in the Surrogate's Court, but the administration is ordinarily one of mere business management. In the instant case, not only was business management required, but the estate had to be saved, and in truth, created, as has been heretofore pointed out.

[fol. 357] It is to be taken into consideration, as this court undoubtedly did in fixing the allowances, that living expenses in the City of New York are largely in excess of those prevailing in other parts of the country. It is to be noted that the Reconstruction Finance Corporation policies are largely dictated by officials temporarily residing in Washington and who come from other parts of the country and who are not familiar with the practice of the law and the administration of large business affairs in the City of New York, and the cost of conducting the same. The New York State authorities are naturally more nearly conversant with the situation.

For all of the reasons aforesaid, and by reason of the facts disclosed by the record, to which reference is hereby made, deponents respectfully pray that this application be in all respects denied as to the allowances made to the bankruptcy trustees herein.

Stephen Callaghan.

Sworn to before me this 19th day of April, 1935.
(Sgd.) Thomas A. Gaffney, Notary Public.

[fol. 358] William M. Greve.

Sworn to before me this 19th day of April, 1935.
(Sgd.) Jos. G. Balling, Notary Public Queens County.

Percival E. Jackson.

Sworn to before me this 19th day of April, 1935.
(Sgd.) John P. McKenna, Notary Public, Queens County.

[fol. 359] IN UNITED STATES DISTRICT COURT

In Bankruptcy. No. 25012

In Proceedings for Reorganization of a Corporation. No. 26503

[Title omitted]

AFFIDAVIT OF WILLIAM W. FLEMING IN SUPPORT OF MOTION OF RECONSTRUCTION FINANCE CORPORATION TO VACATE AND REVISE ORDERS RELATING TO ALLOWANCES.

UNITED STATES OF AMERICA
Southern District of New York, ss:

William W. Fleming, being duly sworn, deposes and says:

I am a law clerk, associated with Debevoise, Stevenson & Plimpton, attorneys for the Reconstruction Finance Corporation in these proceedings.

On information and belief, set forth below are certain data with respect to the allowances made within recent months in the Southern District of New York to receivers, [fol. 360] trustees, receivers' attorneys and trustees' attorneys in large receivership, bankruptcy and reorganization proceedings in said Southern District.

Such data clearly shows that the allowances made in the Allied Owners Corporation bankruptcy proceedings are excessive and exorbitant in comparison with allowances made in the comparable proceedings in the Southern District.

Allied Owners Corporation Trustees' Allowances

On August 25, 1933, Messrs. Callaghan, Jackson and Greve were elected trustees of Allied Owners Corporation in Bankruptcy. The election of Messrs. Jackson and Callaghan was approved by Referee Stitt; the election of Mr. Greve was disapproved by Referee Stitt, but his election was later confirmed.

The bankruptcy proceedings of Allied Owners Corporation were superseded by the reorganization proceedings under Section 77B of the Bankruptcy Act on June 22, 1934.

It follows from the foregoing that the work of the three bankruptcy trustees covered a period of slightly less than ten months, or a total of approximately three hundred days, disregarding the fact that Mr. Greve's services did not commence until approximately September 12, 1933.

The allowance made by Judge Inch to the trustees is $90,000., or an average of approximately $300 per day.

On information and belief, none of the three bankruptcy trustees devoted anywhere near all of his time to Allied Owners Corporation matters during such ten months. On information and belief, Mr. Greve, during such period, was engaged in many diverse business activities not related to Allied Owners Corporation; Messrs. Callaghan and [fol. 361] Jackson, during such period, were actively engaged in the general practice of the law.

Allowances to Other Receivers

On information and belief, set forth below is a table, based on a study of certain large receiverships in the Southern District of New York, showing allowances made to receivers:

International Combustion Engineering Corporation		
Book value of assets.....	$53,418,775.76	Period covered: 12/26/29- 2/ 9/34
Allowance to receivers.....	$273,000.00	Approximate days covered: 1500
Allowance per day approximately $182.		
Interborough Rapid Transit Co.		
Book value of assets.....	$523,000,000.00	Period covered: 10/11/32- 3/10/34
Allowance to receivers.....	$60,000.00	Approximate days covered: 510
Allowance per day approximately $117.64.		
Prince & Whitely		
Book value of assets.....	$11,698,832.18	Period covered: 10/ 9/30- 6/ 6/33
Allowance to receivers.....	$55,000.00	Approximate days covered: 960
Allowance per day approximately $57.		
Pynchon & Co.		
Book value of assets.....	$12,842,213.52	Period covered: 4/24/31- 6/ 9/32
Allowance to receivers.....	$31,000.00	Approximate days covered: 420
Allowance per day approximately $74.		
[fol. 362]		
Shubert Theatres Corporation		
Book value of assets.....	$23,549,000.00	Period covered: 10/20/31-12/24/32
Allowance to receivers.....	32,500.00	Approximate days covered: 420
Allowance per day approximately $77.		

F. & W. Grand Stores

Book value of assets.....	$9,709,999.59	Period covered: 3/19/32– 8/22/32
Allowance to receivers.....	32,500.00	Approximate days covered: 150
Allowance per day approximately $217.		

Radio Keith Orpheum

Book value of assets.....	$75,758,668.92	Period covered: 1/30/33– 5/31/34
Allowance to receivers.....	35,000.00	Approximate days covered: 480
Allowance per day approximately $73.		

Paramount Publix Corporation

Book value of assets.....	$149,724,338.55	Period covered: 1/26/33– 4/18/33
Allowance to receivers (Interim).....	20,000.00	Approximate days covered: 90
Allowance per day approximately $222.		

It will be noted that in all of the foregoing cases the allowances were at a very substantially lower rate per day than those allowed in the Allied Owners proceeding by Judge Inch.

This affidavit includes data with respect to all receivership cases covered by the study where the period covered by the allowance was more than two months, and thus comparable to the ten months involved in the Allied Owners [fol. 363] Corporation bankruptcy, whether or not the allowances were at a greater or lesser rate than that authorized by Judge Inch. No attempt whatsoever has been made to select cases favorable to the position taken by Reconstruction Finance Corporation; the study represents an impartial effort to obtain data with respect to proper allowances in large receivership and bankruptcy matters.

Allowances to Other Trustees

On information and belief, the following is the data with respect to bankruptcy trustees' allowances covered by the study in question:

Schulte United, Inc.

Book value of assets.....	$33,057,090.22	Period covered: 2/ 4/31– 5/31/33
Allowance to trustees.....	104,867.51	Approximate days covered: 810
Allowance per day approximately $129.		

International Match Corporation

Book value of assets.....	$275,000,000.00	Period covered: 6/ 1/32– 1/ 1/34
Allowance to trustees.....	59,870.80	Approximate days covered: 570
Allowance per day approximately $105.		

Retail Chemists Corporation

Book value of assets..... $10,675,000.00

Allowance to trustees..... 65,000.00

Allowance per day approximately $127.

Period covered: 8/12/32– 1/10/34
Approximate days covered: 510

[fol. 364]

Paramount Public Corporation

Book value of assets..... $149,724,338.55

Allowance to trustees..... 97,500.00

Allowance per day approximately $232.

Period covered: 4/17/33– 6/16/34
Approximate days covered: 420

Allied Owners Corporation Trustees' Counsel Allowances

The orders of Judge Inch allow Messrs. Goldwater & Flynn, counsel for the Allied Owners Corporation bankruptcy trustees, $75,000 as a final allowance for their services during the bankruptcy—a period covering approximately 10 months.

The petition of Messrs. Goldwater & Flynn shows that the firm spent 4508 hours on the bankruptcy work during such 10-months period, of which 1485 hours were spent by members of the firm and 3,023 hours by clerks.

On information and belief, the two clerks who spent substantially all such 3,023 hours are Mr. Oliver T. Cowan, who was admitted to the bar in 1932 and Mr. Nathan Goldstein, who was admitted to the bar in February, 1934.

The allowance of $75,000 is at the rate of $16.60 per hour for the total of 4,508 hours stated in the petition to have been worked.

Other Counsel Allowances

The only proper basis of comparison between allowances to counsel in various receivership or bankruptcy proceedings would seem to be the compensation per hour. Comparisons involving merely the period of time during which services were rendered are obviously valueless, since no [fol. 365] account is taken of the amount of time actually spent during the period, or of the number of lawyers who were engaged in the work and their aggregate time.

On information and belief, set forth below is the relevant data with respect to all allowances to counsel in the cases covered by the study where the hours spent by counsel are specified.

It should again be noted that no attempt has been made to select cases favorable to the Reconstruction Finance Corporation's viewpoint.

International Combustion Engineering Corporation
Book value assets: $53,418,775.76 — Allowance: $160,000
Receivers counsel: Cravath, deGersdorff, Swaine & Wood — Hours spent: 26,700
Approximate allowance per hour: $5.98.

Prince & Whitely
Book value assets: $11,698,832.18 — Allowance: $15,000
Receivers counsel: Cravath, deGersdorff, Swaine & Wood — Hours spent: 1,300
Approximate allowance per hour: $11.53.

Pynchon & Co.
Book value assets: $12,842,213.52 — Allowance: $75,000
Receivers counsel: Winthrop, Stimson, Putnam & Roberts — Hours spent: 4,697
Approximate allowance per hour: $15.96.

Shubert Theatres Corporation
Book value assets: $23,549,000.00 — Allowance: $65,000
Receivers counsel: Cravath, deGersdorff, Swaine & Wood — Hours spent: 7,200
Approximate allowance per hour: $9.02.

[fol. 366]

Radio Keith Orpheum
Book value assets: $75,758,668.92 — Allowance: $70,000
Receivers' counsel: Donovan, Leisure, Newton & Lumbard — Hours spent: 12,400
Approximate allowance per hour: $5.64.

Paramount Publix Corporation
Book value assets: $149,724,338.55 — Interim receivership, allowance: $75,000
Receivers' and trustees' counsel: Root, Clark, Buckner & Ballantine — Receivership hours spent: 4,821
Interim bankruptcy allowance: $175,000. — Bankruptcy hours spent: 33,400
Approximate interim allowances per hour: $15.55 for receivership, $5.23 for bankruptcy.

It is to be noted that all the above allowances are less per hour than that made to Messrs. Goldwater & Flynn; that substantially all of such smaller allowances were made in cases involving assets with considerably more than the assets in the Allied Owners Corporation bankruptcy; and that all the law firms cited above are firms of the very highest standing.

William W. Fleming.

Subscribed and sworn to before me this 24th day of April, 1935. Georgette Brill, Notary Public, Queens County.

[fol. 367] IN UNITED STATES DISTRICT COURT

In Bankruptcy. No. 25012

In Proceedings for Reorganization of a Corporation. No. 26503

[Title omitted]

AFFIDAVIT OF PERCIVAL E. JACKSON AND MONROE GOLDWATER, VERIFIED APRIL 26, 1935

STATE OF NEW YORK,
County of New York, ss:

Percival E. Jackson, Trustee in Bankruptcy of Allied Owners Corporation, and Monroe Goldwater, a member of the firm of Goldwater & Flynn, counsel for the Trustees in Bankruptcy of the said corporation, being duly sworn, depose and say, and each, for himself, says:

Percival E. Jackson was one of the three duly elected and qualified Trustees in Bankruptcy of the Estate of Allied Owners Corporation (hereinafter sometimes called the "Corporation"), and as such Trustee, with his two co-Trustees, administered that Estate in the above entitled bankruptcy proceedings of the said Corporation.

[fol. 368] Messrs. Goldwater & Flynn, of which your deponent, Monroe Goldwater, is a partner, were the duly appointed counsel for the said Trustees in Bankruptcy, and acted as such counsel in the above entitled bankruptcy proceedings of the said Corporation.

This affidavit is submitted in support of the allowances made to the Trustees in Bankruptcy and their counsel, Messrs. Goldwater & Flynn, for work done by them in the above-entitled bankruptcy proceedings.

When, in August of 1933, the Corporation was adjudicated a bankrupt, the condition of its Estate was dismally hopeless. The two sources from which the Corporation derived the overwhelming proportion of its income seemed to have dried up: Paramount Publix Corporation, obligated to make payments to the Corporation in the sum of approximately $65,000 per month for a period of time ending in 1943, and $3,100,000 at the end of such period, was in default on that obligation. Loew's Theatre & Realty Corporation, obligated to make payments to the Corpora-

tion in the sum of approximately $58,000 per month for a similar period and $3,500,000 at the end of such period, had also defaulted on that obligation. Consequently, the Corporation had been unable to make the interest payments which came due in July of 1933 upon its outstanding First Mortgage Bonds and Debentures. It had previously defaulted upon its obligation to pay interest and principal upon the mortgages covering its Glens Falls, New York, and Fremont, Ohio Theatres.

Consequently, the various mortgagees were threatening to institute foreclosure actions, and, indeed, the Trustees [fol. 369] of the first mortgage covering the five large theatres of the Corporation, and the second mortgagee in respect of the Glens Falls, New York and Fremont, Ohio Theatres of the Corporation applied to the Court for permission to foreclose their mortgages. Such a course of conduct on their part would have wiped out the Estate available for unsecured creditors, and would have been disastrous as well to the foreclosing mortgagees. The prospects at that time were that no one, not even the prior lienors, could possibly realize from the Estate the amounts necessary to pay off in full the obligations due to them. So far as the creditors junior to the first mortgage-s were concerned, the Estate was in truth a "no-asset" Estate; and so far as the first mortgagees were concerned, there were probably not enough assets in the Estate to satisfy their demands in full.

These, then, were the conditions when Percival E. Jackson, Stephen Callaghan and William M. Greve qualified as Trustees in Bankruptcy of Allied Owners Corporation, and Goldwater & Flynn were retained as their attorneys. They forthwith took the following steps to ameliorate those conditions.

The said Trustees and their counsel entered into protracted and delicate negotiations with the various mortgagees who were clamoring for the liquidation which, in the opinion of your affiants, would have been disastrous to the best interests of the Estate as a whole. Those negotiations were successful; the mortgagees agreed to co-operate with the Trustees in maintaining the status quo and abandoned the course of conduct which would have resulted ultimately in foreclosure.

Liquidation forestalled for the time being, the Trustees in Bankruptcy and their counsel proceeded to bring the [fol. 370] necessary moneys into the Estate which would permanently forestall foreclosure and make possible payment to creditors.

The Loew corporations were the keystone of this situation. Negotiations were therefore undertaken and an eminently satisfactory compromise was worked out. The Loew corporations deposited $250,000, pursuant thereto and agreed to, and have, deposited $41,666.66 more each month. This compromise was, in an exact sense, consummated in the above-entitled bankruptcy proceedings although the agreement of compromise was physically executed after the termination thereof. When the petition of the Corporation under Section 77B of the National Bankruptcy Act was approved on June 22nd, 1934, the compromise with the Loew corporations had reached such stage that the preparation of the agreement which was actually to be signed by the contracting parties was mere matter of form.

Numerous other complications and obstacles, apparently insoluble at the time, were met and overcome. Disastrous liquidation was forestalled. The ground work for the reorganization which is admitted by all interested parties to be infinitely more desirable than liquidation, has been effectively prepared. The dismal conditions above described have been translated by the said Trustees and their counsel into conditions which made possible a reorganization plan by virtue of which all of the creditors of the Corporation will receive the full amount of the principal obligations owed to them. In addition, interest payments will be made to them. The bonds secured by a first mortgage on the five large theatres of the Corporation will receive four per cent interest on their investment and, as [fol. 371] soon as income permits, an additional one per cent. Nor need they forego the back interest due them. They will receive, probably, three per cent of the six per cent owing to them on account of such back interest.

The Debentures secured by a second mortgage on the same property will also receive favorable interest payments. They, pursuant to the plan, are entitled to two per cent per annum as a start and, so soon as income permits, additional interest percentages up to four per cent; and, after the First Mortgage Bonds shall have been retired, and

income permitting a fifth per cent. The present third mortgage upon the same properties and all unsecured creditors of the Corporation will receive interest in the same amounts as the debenture holders. Provision is also made for the payment of, probably, three per cent in back interest to the Debentures and unsecured creditors of the Corporation.

The mortgagees with respect to the Corporation's Glens Falls, New York and Fremont, Ohio Theatres, will also receive the full amount of the principal obligation owed to them and six per cent interest thereon.

Thus, the Estate, which in August of 1933 was, so far as the junior creditors were concerned, a "no-asset" estate, and which was with respect to the senior creditors a dubious one, is at the present time an estate out of which (pursuant to the terms of the reorganization plan which has been approved by the Court and which will inevitably be confirmed) the creditors of the Corporation will be paid in full.

The foregoing is a summary statement of the situation which confronted the Trustees and counsel when they entered upon the administration of the bankrupt Estate and [fol. 372] the results which were obtained through their efforts. A detailed statement of the services involved and the protracted negotiations and proceedings which were essential to the development of the plan eventually adopted is fully set forth in the applications for allowances of the Trustees and counsel, filed with the Referee in this Court.

With respect to the cases cited by counsel for Reconstruction Finance Corporation for comparison of the fees and allowances to your deponents with those allowed to trustees and counsel in the cases cited, your deponents allege that many of them, such as F. & W. Grand Stores, Schulte United, Inc., and Retail Chemists Corporation, are cases of retail businesses which had large organizations engaged in the buying and selling of merchandise. The Trustees in Bankruptcy had, thus, the benefit of substantial services of buyers, managers, merchandise experts and other numerous employees who were engaged in such business prior to the bankruptcies, and who continued in the employment of the trustees thereafter. The character of these businesses required, consequently, no such personal attention to, and contact with, the business and assets of

the bankrupt as was required in this case. The Trustees in Bankruptcy in this case engaged no employees except a bookkeeper on part time involving an expense of $50.00 per month and incurred no other charges or expenses of any kind whatsoever. Nor, as your deponents are informed and verily believe, were the results to the creditors in any of the cases cited by the Reconstruction Finance Corporation as satisfactory and profitable as they were in this case.

[fol. 373] Others of the cases cited (Prince & Whitley and Pynchon & Company) are stock brokerage cases involving, primarily, the liquidation of assets in the ordinary course and not the intricate and delicate negotiations and constructive labor required to reorganize and rehabilitate a business.

The case cited by Reconstruction Finance Corporation most nearly comparable to our own is that of Paramount Publix Corporation, in which the receivers were granted $20,000. as an interim allowance only for services for a period of approximately ninety days (at the rate, thus, of $222.00 per day). Obviously, since this allowance was only an interim allowance, it is subject to increase by such sum as may be granted on final allowance. In the same case the same persons were allowed an additional $97,500 for their services as bankruptcy trustees covering approximately 420 days (at the rate, thus, of $232.00 per day).

Counsel in the Paramount Publix Corporation case were granted an interim allowance of $75,000. for services rendered in the Equity receivership of the corporation covering 4,821 hours of work (or at the rate of $15.55 per hour) and thereafter the same attorneys were given an interim bankruptcy allowance of $175,000. Both of these allowances were allowances on account only, as clearly indicated by the opinion of the Referee and the Court, and subject, therefore, to substantial increase upon completion of the work.

While the Paramount Publix Corporation case is to some degree comparable to this case because of the similar character of the two businesses, no such favorable result for the creditors was obtained in that case as in the case at bar. In that reorganization the creditors are given only

[fol. 374] fifty per cent of their claims in the obligations of the reorganized company, i. e., in unsecured debentures. The remaining fifty per cent is paid with the preferred stock of that company. In the case before this Court, all creditors are paid in full with the fully secured obligations of reorganized Allied Owners Corporation. Your deponents stress this fact because, as pointed out in the brief submitted to the court, one of the most important of the tests employed in ascertaining the amount of fees to be allowed is to measure the success which attended the efforts of your deponents in the performance of their duties. In this connection reference is made to the Osofsky case (cited in the memorandum of law submitted in connection with this affidavit) and the discussion of the court there contained.

The affidavit of Reconstruction Finance Corporation states (page 4 thereof) that "No attempt whatsoever has been made to select cases favorable to the position taken by Reconstruction Finance Corporation; the study represents an impartial effort to obtain data with respect to proper allowances in large receivership and bankruptcy matters" in the Southern District. It is pointed out that all of the cases cited by Reconstruction Finance Corporation are unreported cases. Consequently, such cases can represent no complete compilation of allowances made in this vicinity. There may be many other cases in the files of the Southern District, also unreported, which make allowances to receivers, trustees and counsel greatly in excess of the allowances made in the cited cases.

For example, counsel for Reconstruction Finance Corporation has not cited the following two unreported cases. In the Matter of John Monroe & Company and in the Mat-[fol. 375] ter of American Piano Company. In the Monroe case, your deponents are informed and verily believe, as follows:

The active administration of the estate lasted approximately one year. The book value of the assets at the beginning of such administration was four million dollars. The actual value thereof was approximately one million dollars. The company did a private banking and stock brokerage business and the administration of the estate, therefore, in Equity receivership, required no comparable

amount of attention and detailed work on the part of the Equity receivers. Nevertheless, the receiver has received $22,500. to date and counsel has received $45,000. to date. This Estate has not yet been closed. It is pointed out, in addition, that the creditors in this estate will receive only approximately twenty-five per cent of the amounts owed to them by John Monroe & Company.

In the American Piano case, your deponents are informed and verily believe, as follows:

The active administration of that estate lasted only eight months. The value of the assets was only between three and four million dollars. Furthermore, the plan of reorganization there ultimately adopted encountered no opposition requiring constant negotiation and fidelity to the task involved required in this case. In that case the receiver nevertheless received $45,000. in fees and counsel received $65,000. The amount of work entailed, the results achieved, the value of the assets administered, and the difficulty and number of the problems involved were in no wise comparable, in the last two cases cited, to the analogous matters present in this case.

The implication of the above set forth quotation from the [fol. 376] affidavit of Reconstruction Finance Corporation that the fees and allowances made in the cases cited by them are necessarily representative of all fees and allowances made in the Southern District cannot be sustained. At most, the compilation is a fragmentary and random selection of the few unreported decisions with which counsel was either familiar or which counsel was able to find in its search through the thousands and thousands of files maintained in the Southern District.

Percival E. Jackson.

Sworn to before me this 28th day of April, 1935.
(Sgd.) John P. McKenna, Notary Public, Queens County.

Monroe Goldwater.

Sworn to before me this 28th day of April, 1935.
(Sgd.) Louis R. Colman, Notary Public.

[fol. 377] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

In the Matter of ALLIED OWNERS CORPORATION, Debtor

May 8, 1935.

Appearances:

Debevoise, Stevenson & Plimpton, Esqs., Attorneys for Reconstruction Finance Corporation, for Motion.

Schiff, Dorfman & Stein, Esqs., Attorneys for certain bondholders for Motion.

Goldwater & Flynn, Esqs., Attorneys for Trustees, opposed.

Robert P. Levis, Esq., Attorney for Allied Owners Corporation, opposed.

Cullen & Dykman, Esqs., opposed.

OPINION OF INCH, J. OF MAY 8, 1935

INCH, J.:

This is a motion, in a proceeding under 77-B of the Bankruptcy Act, as amended, in regard to certain orders directing the payment of allowances in a prior bankruptcy proceeding, which allowances were fixed by the court making the appointments, etc.

[fol. 378] The principal motion is made by the Reconstruction Finance Corporation, one of the creditors of the debtor. The motion is joined in by certain other creditors.

The history of this matter is briefly as follows:

On August 8, 1933, the Allied Owners Corporation was adjudicated a bankrupt in this court. The proceeding was thereupon duly referred to one of the referees in bankruptcy for this district. Stephen Callaghan, Percival E. Jackson and William M. Greve were thereafter duly elected and qualified as trustees in bankruptcy and duly took possession of the very large, important and complicated interests of the bankrupt. The estate runs into millions of dollars in value.

These trustees continued as such trustees until June 22, 1934, a period of almost a year. During this time matters of great importance, involving heavy responsibility, and requiring both business and legal skill of the highest degree, were constantly presented and disposed of.

By the exercise of the above qualities the estate of the bankrupt was held intact and managed with such excellent ability, by those whose allowances are now questioned, that on June 22, 1934, a petition of the corporation under Section 77-B of the National Bankruptcy Act was made reasonably possible and same was duly filed and approved.

The said trustees in bankruptcy were thereafter duly appointed temporary, and subsequently permanent, trustees of the debtor. They duly qualified as such and have acted and are still acting.

The firm of Goldwater & Flynn had been duly appointed attorneys for the trustees in bankruptcy and acted as such during the period of bankruptcy. They were thereafter duly appointed and are acting as attorneys for the trustees of debtor.

[fol. 379] The proceeding under 77-B has resulted in the presentation of a plan, with hearings before a special master. The plan has been recommended by said special master which has been duly approved by the court. It has been accepted by more than the required amount of the creditors.

It became apparent therefore, during the latter part of January 1935, that the previous bankruptcy proceeding which had sought liquidation and not rehabilitation of the debtor was a proceeding that need no longer be considered.

Accordingly, the question of allowances in that bankruptcy proceeding, for services rendered during the many months thereof, properly arose and the said referee in bankruptcy proceeded to a hearing of applications therefor.

On February 4, notice was duly given by mail to all creditors and stockholders of the bankrupt and of the debtor whose claims were duly filed, of a hearing before the referee to be held February 15, 1935. On that date the said hearing was duly held at which time the question of allowances and objections thereto was duly considered by the referee.

On March 5, 1935, the referee duly filed, with the clerk of this court, his report and recommendations and also his own application for allowance as referee. A copy of his report was also duly mailed to all those who had appeared at the said hearing, with the exception of one small creditor who had given no address.

On March 11, 1935, this court in which the said trustees in bankruptcy had been appointed, and which had had charge of said bankruptcy proceeding, entered its order fixing the allowances and providing for the payment thereof.

Notice of this fact of proposed payment on March 21, was, on March 14, duly given by publication in accordance with 77-B (c-7).

[fol. 380] No exceptions or objections have been filed to the report of the referee.

No appeal has been taken from any of the orders so entered.

On March 20, 1935, the creditor, Reconstruction Finance Corporation, obtained an order to show cause why an order should not be made vacating and setting aside the said three orders, revising the allowances made and reducing same to legal and reasonable amount. That motion, on consent, was thereafter duly adjourned from time to time until April 19, 1935 at which time it was joined in by certain bondholders and on which day it was argued, all papers to be submitted by April 29, 1935.

It is this motion that must now be decided.

At the outset certain observations should be made.

The plainly expressed purpose of Congress in affording this new form of relief to distressed debtors, is to avoid the liquidation of its property which usually follows a bankruptcy or an equity suit with Receivership, and give opportunity for a rehabilitation of the debtor. Unusual and broad powers are reposed in the court for the above purpose.

This confidence so reposed in the court, assumes that the assets of such estate will be deemed a trust to be carefully and skillfully guarded.

Thus extravagant and ill considered payments out of this estate by means of excessive or exorbitant allowances and otherwise are matters with which this court is particularly concerned in the carrying out of this obligation.

Such payments must be both reasonable and equitable, regardless of whether they have been previously fixed by some other court or judge, in some other proceeding, for, it is the debtor's estate from which the payment must be made.

[fol. 381] It follows therefore that all such payments from this fund must be carefully considered anew whenever to

be made and whenever new applications for other payments arise, in the required exercise by the court of reasonable and proper economy of administration of the fund, having for its sole purpose the rehabilitation of the debtor.

This calls for both common sense and courage to recompense reasonably and fairly for services duly rendered. It requires also equally stern refusal to make uncalled for and extravagant payments from the fund.

This important discretion must be reposed somewhere. It seems to me, it is a part of the heavy duty that has been reposed by Congress on the judge in charge of the proceeding for he is, in most cases, far more conversant with what has been done than many creditors who may later object to what otherwise might appear to be excessive requests and payments.

This discretion may be abused, but unless there is plainly such abuse the very accomplishment of the amendment may be seriously affected as it calls for, in the many cases of importance, the cooperation of the best legal minds and business acumen, representing great financial interests, in matters often complicated and involved, all of which requires consideration of what is reasonable and fair compensation for services rendered by such firms and persons at the proper time, with due consideration of the many other circumstances which exist where such large and important law firms and recognized leaders of the bar and the business world, have been engaged. Such reasonable and fair compensation should be reasonably assured.

It is unnecessary to review the extent of the services here rendered and for which allowances have been recommended [fol. 382] by the referee, as these are fully set forth elsewhere in the record.

Suffice it to say that had the estate been liquidated no such controversy as this in regard to fees could have arisen but because the trustees in bankruptcy, having in mind the hoped for rehabilitation of the debtor, steadfastly devoted their skill and best efforts to what thereafter turned out to be the solid foundation of the present acceptable plan, they have been exposed to the criticism that they can only be allowed fees based on a liquidation.

This is contrary to the very purpose of 77-B which removes the temptation of bankruptcy trustees to reduce to cash the estate and assures them of a reasonable allowance

even though they have been prevented from liquidating the estate.

Counsel for the objecting creditor asserts that Section 48 of the Act controls and that this provides the sole measure of compensation for the trustees and that the fact that, owing to the small amount of cash paid out by the trustees, such commissions may be inadequate, is beside the point.

The maximum allowance, according to Section 48, and this interpretation by counsel for the objecting creditor, would be approximately $15,000. or $5,000. to each trustee. In open court counsel for this objecting creditor stated that he agreed that any such allowance would be inadequate. Nevertheless, if he is correct in his interpretation, this is all that can be allowed. It certainly cannot be made up from any other fund.

It does not seem to me however, that Section 48 controls the maximum of such allowance. The word "reasonable" was inserted by Congress in 77-B to give just what is plainly intended, where there is no liquidation, this right of the 77-B court to consider the "reasonableness" of any allowance which would be paid from the fund regardless [fol. 383] of the procedure which was taken elsewhere (77-B Section K).

Counsel for the objecting creditor asserts that this word "reasonable" was inserted only for the purpose of giving the 77-B court the right to refuse the allowances of the prior court and not to remove limitations of such allowances.

To me this is too narrow a view.

It is possible that an allowance can be as unreasonably inadequate as unreasonably large. Any maximum may be unreasonably small, as seems to be indicated here, or a minimum may be unreasonably large in view of what was actually done.

I do not think that this court, with the power and duty to pay a "reasonable allowance" is thus compelled to pay an "unreasonable" one because some other court has so provided. This interpretation is not within either the words or spirit of the Act, pursuant to which alone any power to make any payment, of any allowance, is given. In this matter there is no reason to send the question of allowances back for reconsideration.

Owing to the newness and unique character of this amendment, decisions in proceedings of other kinds, while useful, are not determinative.

Interim allowances are suggested but they are not applicable here for the reason that for all practical purposes the bankruptcy proceeding is terminated and these allowances are to be considered final.

Moreover interim allowances, however necessary on rare occasions, are not to be favored, as such allowances, when small in themselves, quite often, in the aggregate, result in larger payments than would otherwise have been made for the services rendered. So far as possible they should be avoided.

As to the reasonableness of the payments to be made the difficulty that was presented to the court in ascertaining [fol. 384] the proper amount is emphasized by the affidavits presented by these objecting creditors.

In its moving papers the principal objecting creditor states "we do not mean to minimize the work done by the trustees and their counsel during the bankruptcy proceeding".

In the papers of the debenture holders committee appears the following: "We recognize the fact that such trustees in bankruptcy rendered very valuable services to the estate during the bankruptcy period."

Again in these papers appear various voluntary suggestions as to what should have been allowed. One suggestion is that $45,000. to the three trustees would be fair compensation and $60,000. would be fair compensation for the counsel, that $7,500. would be fair compensation to the attorney for the debtor. Another suggestion is $60,000. to the trustees as being fair, while the principal petitioning creditor suggests that if Section 48 does not control $30,000. might be a fair allowance.

Without responsibility or the duty it is comparatively easy to object to any allowance and suggest a lesser sum.

So in the allowance to counsel which covers a total of 4500 hours actually spent, an arbitrary sum per hour is suggested which is felt to be too high.

It may well be, in the absence of some more scientific plan or, the rigidity of a statute, that the court may have views quite different from those who object but the question still remains who is to determine what is reasonable?

The Act imposes this heavy duty on the court having charge of the proceeding.

As to the application of the attorneys for Mr. Greve, the referee has duly heard the matter and recommend- the allowance. This man was nominated as one of the three [fol. 385] trustees in bankruptcy by the Reconstruction Finance Corporation. He was apparently a man of experience with special ability. He was unanimously elected over the objections of the referee and was seated by the court after a considerable amount of necessary legal proceedings. These attorneys were not attorneys for a receiver or trustee for the reason that Mr. Greve was not a trustee until they were successful. To be sure he had been unanimously nominated by all the creditors but his acting as such trustee had been entirely prevented by the referee.

The allowance in question is confin to services rendered prior to his becoming a trustee duly qualified and represents the legal cost and disbursements which Mr. Greve was obliged to incur because of this selection by the creditors as one of the trustees. It was an obligation incurred by Mr. Greve as a prior trustee in the preservation of a substantial right of a creditor to have a trustee chosen by them in charge of the bankrupt estate and as long as the amount is reasonable and the legal services were clearly required the allowance became one which in equity should be made and I will not disagree with the referee's recommendation.

For the foregoing reasons the payments to be made are considered reasonable, are not, in view of the conceded valuable services rendered, extravagant, excessive or exorbitant. With due regard for the proper economy which must be observed in the administration of such estates and the due performance of the trust imposed in the court, it sees no reason to vacate or modify its orders.

Motion denied.

Robert A. Inch, U. S. District Judge.

[fol. 386] IN UNITED STATES DISTRICT COURT

In Bankruptcy. No. 25012

In the Matter of ALLIED OWNERS CORPORATION, Bankrupt

In Proceedings for Reorganization of a Corporation. No. 26503

In the Matter of ALLIED OWNERS CORPORATION, Debtor

ORDER DENYING MOTION FOR ORDER VACATING ORDERS—May 13, 1935

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed as follows:

1. The motion of Reconstruction Finance Corporation by Jerome Thralls, its special representative, by petition verified March 20th, 1935 and order to show cause dated [fol. 387] the same day, for an order vacating and setting aside the three orders, below described, of Honorable Robert A. Inch, United States District Judge, dated March 11, 1935, revising the same by reducing to legal and reasonable amounts.

(a) the allowances to Stephen Callaghan, Percival E. Jackson and William M. Greve; to Goldwater & Flynn; to Robert P. Levis; to Cullen & Dykman; and to Theodore Stitt, made by two certain orders of the Honorable Robert A. Inch, United States District Judge, dated March 11th, 1935, and entitled in the above bankruptcy and reorganization proceedings; and

(b) the amounts directed to be paid to the said persons by the third order of the said Judge, dated the same day and entered in the above entitled reorganization proceedings,

be and it hereby is in all respects denied.

2. The motion of Betty Finkelstein and E. Johnson Cowdrey, joining in the application of Reconstruction Finance Corporation, by notice of motion dated April 5th, 1935,

and petition signed and verified by Betty Finkelstein on March 28th, 1935, be and it hereby is in all respects denied.

3. The stay contained in the said order to show cause dated March 20, 1935, staying the Trustees of the Debtor in the above entitled reorganization proceedings from any and all action under, and from making the payments directed by, the order of Judge Inch made on March 11, 1935, in the above entitled reorganization proceedings, be and [fol. 388] it hereby is vacated and dissolved subject to the provisions herein below contained.

4. The Trustees of the Debtor herein be and they hereby are stayed from making the payments directed by, the said order dated March 11, 1935, made by Judge Inch in said reorganization proceedings, except that said Trustees are directed forthwith to make the payments of the sum of One Thousand Fifty Dollars ($1,050) to Horowitz, Farrell & Company and the sum of Five Hundred Dollars ($500) to Matthews Brown & Company, as provided in said last mentioned order; such stay to continue until the determination of any appeal taken by Reconstruction Finance Corporation, or allowed upon its application, from this order and said three orders of March 11, 1935, or any of them, and until the further order of this court.

(Sgd.) R. A. Inch, U. S. D. J.

[fol. 389] In United States District Court

In Bankruptcy. No. 25012

In Proceedings for Reorganization of a Corporation. No. 26503

[Title omitted]

Petition of Appeal of Reconstruction Finance Corporation

To the Honorable Judges of the United States District Court for the Eastern District of New York:

Your petitioner, Reconstruction Finance Corporation, considering itself aggrieved by that certain order entered

in the two above-entitled proceedings on March 11, 1935, in so far as said order allowed (1) the sum of $90,000 to Stephen Callaghan, Percival E. Jackson and William M. Greve, as Trustees in Bankruptcy of Allied Owners Corporation, for services rendered in the above-entitled bankruptcy proceedings, (2) the sum of $75,000 to Goldwater & Flynn, Esqs., as attorneys for said Trustees for services rendered in said bankruptcy proceedings, (3) the sum of $10,000 to Robert P. Levis, Esq., as attorney for Allied Owners Corporation, for services rendered in said bankruptcy proceedings, and (4) the sum of $2,000 for services and $474.35 for disbursements to Cullen & Dykman, Esqs., [fol. 390] as attorneys for William M. Greve in special proceedings, and considering itself further aggrieved by that certain order entered in the two above-entitled proceedings on March 11, 1935, allowing the sum of $25,000 to Theodore Stitt, Esq., as Referee in Bankruptcy, for services rendered in the above-entitled bankruptcy proceedings, and considering itself further aggrieved by that certain order entered in the above-entitled reorganization proceedings on March 11, 1935, in so far as said order authorized and directed the payment by the Trustees in Reorganization of the allowances granted by the first two orders of March 11, 1935, above mentioned, and considering itself further aggrieved by the order entered in the two above-entitled proceedings on May 13, 1935, denying the motion of your petitioner, brought on by petition verified March 20, 1935, and order to show cause dated the same day, for an order vacating and setting aside the three orders of March 11, 1935, above referred to, revising the allowances made therein as more fully set forth in said petition, does hereby petition for an appeal from the said orders, and each of them, to the United States Circuit Court of Appeals for the Second Circuit and prays that its appeal may be allowed and that a citation may be granted directed to said Stephen Callaghan, Esq., Percival E. Jackson, Esq., William M. Greve, Esq., Goldwater & Flynn, Esqs., Robert P. Levis, Esq., Cullen & Dykman, Esqs., and Theodore Stitt, Esq., commanding them to appear before the United States Circuit Court of Appeals for the Second Circuit to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record and papers in said proceedings, duly authenticated, may be transmitted

to the United States Circuit Court of Appeals for the Sec-
[fol. 391] ond Circuit, under the rules of said Court for such cases made and prescribed.

Dated June 6, 1935.

Reconstruction Finance Corporation, by (Sgd.) Jerome Thralls, Special Representative. Debevoise, Stevenson & Plimpton, Attorneys for Reconstruction Finance Corporation.

Duly sworn to by Jerome Thralls. Jurat omitted in printing.

[fol. 392] IN UNITED STATES DISTRICT COURT

In Bankruptcy. No. 25012

In Proceedings for Reorganization of a Corporation. No. 26503

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes Reconstruction Finance Corporation, and files this, its Assignment of Errors, and says that the two orders entered in the two above-entitled proceedings by the United States District Court for the Eastern District of New York on March 11, 1935, and the order entered in the above-entitled reorganization proceedings on March 11, 1935, by said Court, and the order entered in the two above-entitled proceedings on May 13, 1935, by said Court, were and are, and each of them was and is, erroneous, as hereinbelow set forth:

A. Errors Relating to Allowance to Trustees in Bankruptcy

1. The Court in the above-entitled bankruptcy proceedings erred in its order of March 11, 1935, in allowing to Stephen Callaghan, Percival E. Jackson and William E. Greve, Trustees in bankruptcy therein, for their services
[fol. 393] rendered in said bankruptcy proceedings, the sum

of $90,000, in that said sum exceeded the maximum compensation allowable to said Trustees for such services under Section 48 of the Bankruptcy Act of July 1, 1898, as amended, and said allowance was contrary to law.

2. If it should be determined that said allowance of $90,000 to said Trustees was not contrary to Section 48 of the Bankruptcy Act, then the Court in said bankruptcy proceedings abused its discretion in allowing the sum of $90,000 to said Trustees by its said order of March 11, 1935, in that said sum of $90,000 represented an increase of 50% from the amount of $60,000 recommended by the Referee in Bankruptcy in his report filed March 5, 1935, and said increase was made ex parte and without a hearing by said Court and without opportunity for the creditors to object thereto.

3. If it should be determined that said allowance of $90,000 to said Trustees was not contrary to Section 48 of the Bankruptcy Act, the Court in said bankruptcy proceedings abused its discretion in entering its said order of March 11, 1935, making said allowance of $90,000, as said sum was excessive and exorbitant and was allowed contrary to the provisions of Section 3 of the Act of Congress of June 7, 1934.

4. The Court in the above-entitled reorganization proceedings erred in entering its order of March 11, 1935, allowing said sum of $90,000 to said Trustees in bankruptcy for their services as such and its other said order of March 11, 1935, directing the Trustees in reorganization to make payment [fol. 394] of said allowance, in that said sum exceeded the maximum compensation allowable to said Trustees in bankruptcy for their services as such under Section 48 of the Bankruptcy Act as amended.

5. If it should be determined that the said allowance of $90,000 is not contrary to the provisions of Section 48 of the Bankruptcy Act as amended, the Court in said reorganization proceedings in its said order of March 11, 1935, directing the payment of said allowance, abused its discretion in that under Subdivision (i) of Section 77B the Court could order the payment only of reasonable allowances fixed in the prior bankruptcy proceedings and said sum of $90,000

was not a reasonable allowance but was on the contrary excessive and exorbitant.

6. If it should be determined that said allowance of $90,000 to said Trustees in bankruptcy is not contrary to the provisions of Section 48 of said Bankruptcy Act as amended, the Court abused its discretion in its said orders of March 11, 1935, in making said allowance in that any allowance for said services should be on an interim basis and in a reduced amount.

B. Errors Relating to Allowance to Bankruptcy Trustees' Attorneys

7. The Court erred in entering its orders of March 11, 1935, allowing the sum of $75,000 to Goldwater & Flynn, Esqs., attorneys for the Trustees in bankruptcy, for services rendered in said bankruptcy proceedings and directing the payment of said sum, in that said sum is excessive and exorbitant and contrary to the provisions of Section 3 of the Act of Congress of June 7, 1934.

[fol. 395] 8. The Court abused its discretion in entering said orders of March 11, 1935, allowing and directing the payment of said sum of $75,000 to Goldwater & Flynn, Esqs., in that said amount was not a reasonable allowance for the services rendered by them in said bankruptcy proceedings.

9. The Court abused its discretion in entering said orders of March 11, 1935, allowing and directing the payment of said sum of $75,000 to Goldwater & Flynn, Esqs., in that any allowance for said services should be on an interim basis and in a reduced amount.

C. Errors Relating to Allowance to Bankrupt's Attorney

10. The Court abused its discretion in entering its orders of March 11, 1935, allowing the sum of $10,000 to Robert P. Levis, Esq., attorney for the bankrupt, for services rendered in said bankruptcy proceedings and in directing the payment of said sum, in that said allowance was excessive and not a reasonable allowance for such services and was therefore contrary to the provisions of Section 64(b) (3) and Subdivision (i) of Section 77B of the Bankruptcy Act as amended.

11. The Court abused its discretion in its orders of March 11, 1935, in allowing and directing the payment of the said sum of $10,000 to Robert P. Levis, Esq., in that any such allowance should be fixed on an interim basis and in a reduced amount.

[fol. 396] D. Errors Relating to Allowance to Attorneys for William M. Greve in Special Proceedings

12. The Court erred in entering its said orders of March 11, 1935, allowing the sum of $2,474.35 to Cullen & Dykman, Esqs., attorneys for William M. Greve, individually, for services rendered and disbursements incurred in such capacity and in directing the payment of the sum so allowed.

13. The Court abused its discretion in entering said orders of March 11, 1935, allowing and directing the payment of the said sum of $2,474.35 to Cullen and Dykman, Esqs., for services rendered and disbursements incurred as attorneys for William M. Greve, individually, in that said services were not rendered for or on behalf of a receiver or trustee in bankruptcy, or a creditor, or the bankrupt, and such services did not result in any benefit to the bankrupt estate.

E. Errors Relating to Allowance to Referee in Bankruptcy

14. The Court, in the above-entitled bankruptcy proceedings, erred in allowing to Theodore Stitt, Esq., Referee in Bankruptcy, the sum of $25,000 for services rendered in said bankruptcy proceedings, in that said sum is in excess of the amount to which said Referee was and is entitled under the provisions of Section 40 of the Bankruptcy Act as amended and was allowed contrary to law.

15. If it should be determined that said allowance to said Referee in Bankruptcy does not exceed the maximum amount allowable under the Bankruptcy Act for his services in said bankruptcy proceedings, the Court erred and [fol. 397] abused its discretion in fixing said sum as a final allowance, and particularly in view of the provisions of paragraph (c) of said Section 40 of the Bankruptcy Act as amended.

16. The Court abused its discretion in entering said orders of March 11, 1935, allowing and directing the payment of said sum of $25,000 to said Referee in Bankruptcy in that said sum is excessive and not a reasonable amount for his services rendered in said bankruptcy proceedings.

F. Error Relating to All Allowances

17. The Court erred in denying the motion of Reconstruction Finance Corporation brought on by petition, verified March 20, 1935, and by order to show cause dated the same day, and in refusing to vacate and set aside the three said orders of March 11, 1935, and each of them, and to revise the allowances for services in said bankruptcy proceedings, as prayed for in said petition of Reconstruction Finance Corporation dated March 20, 1935, by reducing said allowances, and each of them, to legal and reasonable amounts; and in denying said motion said Court did commit errors and abuse its discretion in each of the respects referred to in the foregoing assignments of error numbered 1 to 16, inclusive.

Dated New York, N. Y., June 6, 1935.

Reconstruction Finance Corporation, by (Sgd.) Jerome Thralls, Special Representative. Debevoise, Stevenson & Plimpton, Attorneys for Reconstruction Finance Corporation, 20 Exchange Place, New York, N. Y.

[fol. 398] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

In the Matter of ALLIED OWNERS CORPORATION, Bankrupt

In the Matter of ALLIED OWNERS CORPORATION, Debtor

NOTICE OF MOTION OF RECONSTRUCTION FINANCE CORPORATION FOR LEAVE TO APPEAL

SIRS:

Please take notice that upon the annexed petition of Reconstruction Finance Corporation, verified June 6, 1935, and the Petition of Appeal and Assignment of Errors filed

by it in the court below, and copies of which have been filed herein in the office of the Clerk of this Court and copies of which are annexed hereto, the undersigned will move this Court in the courtroom thereof in the Old Post Office Building, in the Borough of Manhattan, City of New York, on the 10th day of June, 1935, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order granting said petitioner leave to appeal from the three orders made by the United States District Court for the Eastern District of New York on March 11, 1935, and the order made by said Court on May 13, 1935, all referred to and described in said petition, and from each of said orders, [fol. 399] and for such other and further relief as to the court may seem just and proper in the premises.

Dated New York, N. Y., June 6, 1935.

Yours, etc., Debevoise, Stevenson & Plimpton, Attorneys for Petitioner, Reconstruction Finance Corporation, Office & P. O. Address, 20 Exchange Place, Borough of Manhattan, New York City.

To Goldwater & Flynn, Esqs., for themselves and as attorneys for Stephen Callaghan, Percival E. Jackson and William M. Greve, Trustees in the above entitled Bankruptcy Proceedings and in the above-entitled Reorganization Proceedings, 60 East 42nd Street, New York City. Robert P. Levis, Esq., Attorney for Allied Owners Corporation, 51 East 42nd Street, New York City. Cullen & Dykman, Esqs., Attorneys for William M. Greve in Special Proceedings, 177 Montague Street, Brooklyn, New York. Theodore Stitt, Esq., Referee in Bankruptcy, 190 Montague Street, Brooklyn, New York.

[fol. 400] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

PETITION FOR LEAVE TO APPEAL

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Your petitioner, Reconstruction Finance Corporation, respectfully shows as follows:

1. Your petitioner is a corporation duly organized and existing under and by virtue of the Act of Congress approved January 22, 1932, as amended.

2. Your petitioner is a creditor of the Bankrupt and Debtor herein in the amount of $1,690,455.45, constituting it one of the largest single creditors. Proofs of claim were duly filed by your petitioner in said bankruptcy proceedings and in said reorganization proceedings, and in the latter proceedings orders have been entered allowing said [fol. 401] claims subject to certain rights in the Trustees to assert set-offs and counterclaims. Your petitioner also holds as pledgee all the issued capital stock of the Debtor.

3. On June 6, 1935, your petitioner filed in the United States District Court for the Eastern District of New York a Petition of Appeal from the following orders made by said Court:

(a) An order of March 11, 1935, entitled in both the above entitled bankruptcy proceedings and reorganization proceedings, (but relating solely to the fixing of allowances for services in said bankruptcy proceedings) in so far as said order allowed (1) the sum of $90,000 to Stephen Callaghan, Percival E. Jackson and William Greve, Trustees in Bankruptcy, for services as such rendered by them in the above-entitled bankruptcy proceedings, (2) the sum of $75,000 to Messrs. Goldwater & Flynn, attorneys for said Trustees, for services rendered in said bankruptcy proceedings, (3) the sum of $10,000 to Robert P. Levis, Esq., attorney for the Bankrupt, for services rendered in said bankruptcy proceedings, and (4) the sum of $2,000 to Cullen & Dykman, Esquires, attorneys for William M. Greve in special proceedings, for their services rendered in such special proceedings, and the sum of $474.35 allowed to Cullen & Dykman, Esquires, for disbursements in said special proceedings.

(b) An order of March 11, 1935, entitled in both said bankruptcy proceedings and said reorganization proceedings which allowed the sum of $25,000 to Theodore Stitt, [fol. 402] Referee in the above entitled bankruptcy proceedings, for his services rendered therein.

(c) An order of March 11, 1935, entitled in said reorganization proceedings, in so far as said order directed Stephen

Callaghan, Percival E. Jackson and William M. Greve, as Trustees in said reorganization proceedings, to pay the said allowances fixed in said two first-mentioned orders of March 11, 1935.

(d) An order of May 13, 1935, entitled in both said bankruptcy proceedings and said reorganization proceedings, denying the motion of your petitioner brought on by petition verified March 20, 1935, and by order to show cause dated the same day, for an order vacating and setting aside said three orders of March 11, 1935, revising the allowances made therein by reducing such allowances to legal and reasonable amounts.

4. An Assignment of Errors was duly filed with said Petition of Appeal in the District Court. Copies of said Petition and Assignment of Errors were, on June 6, 1935, filed herein in the office of the Clerk of this Court. Copies of said Petition and Assignment of Errors are annexed hereto, marked Exhibit A and Exhibit B, respectively, and made a part hereof.

5. On August 8, 1933, Allied Owners Corporation filed its voluntary petition in bankruptcy in the above-entitled bankruptcy proceedings and was duly adjudicated a bankrupt. The Bankrupt's attorney was Robert P. Levis, Esq.

[fol. 403] 6. On or about August 25, 1933, Messrs. Stephen Callaghan, Percival E. Jackson and William M. Greve were elected Trustees in Bankruptcy at a meeting of creditors held before Referee Theodore Stitt. Messrs. Callaghan and Jackson were approved by the Referee and immediately qualified as Trustees. The Referee entered an order refusing to approve Mr. Greve's election. Mr. Greve then personally and without court order retained Messrs. Cullen & Dykman to petition to revise the Referee's order and, as a result thereof, the District Court reversed said order and Mr. Greve qualified as a Trustee on or about September 14, 1933.

7. On or about September 14, 1933, Messrs. Goldwater & Flynn were by order duly retained as attorneys for the Trustees in Bankruptcy.

8. On or about June 22, 1934, the bankruptcy proceedings were superseded by the above-entitled reorganization proceedings, Allied Owners Corporation having filed a petition

under Section 77B of the Bankruptcy Act, as amended, and said petition having been approved by the court on that date. Messrs. Callaghan, Jackson and Greve were appointed temporarily as Trustees in the reorganization proceedings and their appointment was later made permanent. Messrs. Goldwater & Flynn were retained by the Trustees in Reorganization as their attorneys.

9. On or about February 4, 1935, Theodore Stitt, Referee in Bankruptcy, gave notice, entitled in both said bankruptcy proceedings and said reorganization proceedings, of a hearing to be held before him on February 15, 1935, on applica- [fol. 404] tions for allowances for services rendered in said bankruptcy proceedings including the following:

Stephen Callaghan, Percival E. Jackson and William M. Greve, Bankruptcy Trustees		$142,059.96
Goldwater & Flynn, Bankruptcy Trustees' Attorneys		
Services	$100,000.00	
Disbursements	1,247.80	
		101,247.80
Robert P. Levis, Bankrupt's Attorney		
Services	15,000.00	
Disbursements	34.75	
		15,034.75
Cullen & Dykman, Attorneys for William M. Greve, in Special Proceedings		
Services	5,000.00	
Disbursements	474.35	
		5,474.35

The Referee, at the same time, gave notice of his own application for the sum of $25,000 as an allowance for his services rendered in said bankruptcy proceedings.

10. On February 15, 1935, the hearing on allowance applications was held before the Referee. At said hearing, your petitioner by its counsel, Messrs. Debevoise, Stevenson & Plimpton, and certain substantial creditors' committees and other creditors by their counsel, expressed objections to the allowance of the amounts applied for, and following said hearing memoranda were submitted to the Referee objecting to said allowance application by your petitioner and certain other creditors and raising points of law contended for upon this appeal.

11. On March 5, 1935, the Referee filed his report, entitled in said bankruptcy proceedings only, with the Dis-
[fol. 405] trict Court, in which he recommended the following final allowances, *inter alia*, for services rendered in said bankruptcy proceedings:

Stephen Callaghan, Percival E. Jackson and William M. Greve, Bankruptcy Trustees		$60,000.00
Goldwater & Flynn, Bankruptcy Trustees' Attorneys		
Services	$75,000.00	
Disbursements	1,247.80	
		76,247.80
Robert P. Levis, Bankrupt's Attorney		
Services	10,000.00	
Disbursements	34.75	
		10,034.75
Cullen & Dykman, Attorneys for William M. Greve, in Special Proceedings		
Services	2,000.00	
Disbursements	474.35	
		2,474.35

The sum recommended for Cullen & Dykman was stated to be for services performed prior to Mr. Greve's qualification as Trustee, referred to in paragraph 6 of this petition. With said report, the Referee filed his own petition for the allowance of $25,000 for his services rendered in said bankruptcy proceedings.

12. On March 8, 1935, three days after the above report of the Referee was filed with said District Court, Judge Inch handed down a memorandum decision confirming the Referee's recommendations and the Referee's petition for his own final allowance, except that the final allowance to the Trustees in Bankruptcy was increased from $60,000 to $90,000, an increase of 50% over the allowance recommended by the Referee. On Monday, March 11, 1935, only
[fol. 406] six days after the filing of the Referee's report with said District Court, Judge Inch signed the three orders described in subdivisions (a), (b) and (c) of paragraph 3 of this petition and from which this petitioner seeks leave to appeal. The creditors were afforded no opportunity to appear before Judge Inch to be heard on the 50% increase in the final allowance to the Trustees in Bankruptcy.

13. Your petitioner, considering the allowance to the Trustees in Bankruptcy excessive and contrary to law and the allowances to Trustees' counsel and others to be excessive and unreasonable, obtained from Judge Inch on its petition verified March 20, 1935, an order to show cause directing the persons to whom allowances had been made to show cause before him on March 29, 1935, why an order should not be made in both the bankruptcy and reorganization proceedings vacating and setting aside the three orders signed by him on March 11, 1935, and revising the final allowances. The order to show cause contained a stay of payment of the allowances pending the hearing and until further order of the court.

14. On April 19, 1935, the return date having been adjourned from time to time, the hearing on your petitioner's motion was held before Judge Inch and memoranda were subsequently submitted. Attorneys for certain other creditors joined in the argument of your petitioner's attorneys in support of said motion.

15. On May 8, 1935, Judge Inch handed down a memorandum decision deciding against your petitioner's contentions and on May 13, 1935, he signed an order denying [fol. 407] your petitioner's motion in all respects. This is one of the orders from which your petitioner seeks leave to appeal. Said order contains a stay of payment of the allowances which your petitioner contests pending the determination of any appeal allowed upon your petitioner's application and until further order of the Court.

16. The final allowance for services in bankruptcy, sought to be reviewed by your petitioner, aggregate $202,474.35. The bankruptcy proceedings lasted from August 8, 1933 to June 22, 1934. The properties of the Debtor are still in the hands of the court, and in your petitioner's opinion the Court failed to give due consideration to the question of the limited funds of the Debtor actually available for the payment of such allowances and other expenses and allowances.

17. Your petitioner is advised by counsel and respectfully submits that the said orders of March 11, 1935, in so far as they purport to fix and authorize the payment of the allowances for services in said bankruptcy proceedings to the amount of which your petitioner has consistently ob-

jected, and the said order of May 13, 1935 denying your petitioner's motion to vacate and set aside said orders and to reduce said allowances, are erroneous in matter of law for the following reasons and the additional reasons stated in the Assignment of Errors of which a copy is hereto annexed:

The allowance to the Trustees in Bankruptcy has been fixed without regard to the provisions of Section 48 of the Bankruptcy Act and is contrary thereto; the allowance of any amount whatsoever to Cullen & Dykman, as attorneys for William M. Greve in special proceedings, is unwar- [fol. 408] ranted under any provision of the Bankruptcy Act; and the amounts of all of said allowances are unreasonably large and fixing said amounts and overruling your petitioner's objections to said amounts constitute an abuse of discretion on the part of the District Court.

Wherefore, your petitioner prays that leave be granted to it to appeal from the said three orders of the District Court entered on March 11, 1935, and from the order of the District Court entered on May 13, 1935, and for such other and further relief as to this Court may seem just and proper in the premises.

Dated June 6, 1935.

Reconstruction Finance Corporation, by (Sgd.) Jerome Thralls, Special Representative. Debevoise, Stevenson & Plimpton, Attorneys for Reconstruction Finance Corporation, 20 Exchange Place, New York, N. Y.

[fol. 409] *Duly sworn to by Jerome Thralls. Jurat omitted in printing.*

[fol. 410] EXHIBIT A, ANNEXED TO PETITION FOR LEAVE TO APPEAL

Printed herewith at pages 389 to 391.

EXHIBIT B, ANNEXED TO PETITION FOR LEAVE TO APPEAL

Printed herewith at pages 392 to 397.

Order of Circuit Court of Appeals allowing appeal from three orders dated March 11, 1935, and the order dated May 13, 1935.

[fol. 411] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the United States District Court for the Eastern District of New York in the above-entitled matter as agreed on by the parties, and that [fol. 412] the Clerk of the District Court may certify the same as correct.

It is further stipulated and agreed that any party may, on the argument of the appeal with respect to which this transcript of record is prepared, submit to the Circuit Court of Appeals copies of the final report and account of the Trustees in Bankruptcy, dated January 28, 1935, together with the exhibits annexed thereto.

Dated New York, June 19, 1935.

Debevoise, Stevenson & Plimpton, Attorneys for Reconstruction Finance Corporation, Appellant. Goldwater & Flynn, Attorneys for Stephen Callaghan, Percival E. Jackson and William M. Greve, individually and as Trustees in Bankruptcy and as Trustees in Reorganization of Allied Owners Corporation, Appellees. Goldwater & Flynn, for Themselves, as Appellees. Robert P. Levis, for Himself and as Attorney for Allied Owners Corporation, Appellees. Cullen & Dykman, for Themselves, as Attorneys for William M. Greve, in Special Proceedings, Appellees. Theodore Stitt, Referee in Bankruptcy, Appellee.

On reading the foregoing consent of the attorney for the respective parties herein, it is

Ordered that the foregoing printed record be filed in lieu of the original papers for the purpose of certifying the record on appeal. Dated Brooklyn, New York, June 20th, 1935.

Robt. A. Inch, U. S. D. J.

[fols. 413 & 414] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 415] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of ALLIED OWNERS CORPORATION, Bankrupt,

In the Matter of ALLIED OWNERS CORPORATION, Debtor,

RECONSTRUCTION FINANCE CORPORATION, Appellant,

against

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON and WILLIAM M. GREVE, Individually and as Trustees in Bankruptcy and as Trustees in Reorganization of ALLIED OWNERS CORPORATION, GOLDWATER & FLYNN, ROBERT P. LEVIS, CULLEN & DYKMAN and THEODORE STITT, Appellees

Before Manton, Swan and Augustus N. Hand, Circuit Judges

Appeals from the United States District Court for the Eastern District of New York

From an order of the bankruptcy court fixing the compensation of the above named appellees other than Theo-
[fol. 416] dore Stitt, from an order of said court fixing the compensation of Theodore Stitt as referee in bankruptcy, from an order in a 77B proceeding directing the payment of said compensation, and from an order denying a motion to vacate each of said orders, the Reconstruction Finance Corporation appeals. The orders are modified as to Stephen Callaghan, Percival E. Jackson, William M. Greve, Goldwater & Flynn and Robert P. Levis and reversed as to Cullen & Dykman and Theodore Stitt.

Debevoise, Stevenson & Plimpton, Attorneys, and Max O'Rell Truitt, Solicitor for appellant Reconstruction Finance Corporation; E. W. Debevoise, William E. Stevenson and D. F. McGlinchey, Counsel.

Goldwater & Flynn, Attorneys for trustee in bankruptcy in reorganization and pro se; Monroe Goldwater, Nathan Goldstein and Oliver T. Cowan, Counsel.

Robert P. Levis, Attorney for Allied Owners Corporation and pro se.

Cullen & Dykman, Attorneys for William M. Greve; Maximilian Moss and John B. Bennett, Counsel.

AUGUSTUS N. HAND, Circuit Judge:

The questions raised by these appeals all relate to allowances which the court in charge of a proceeding for the reorganization of Allied Owners Corporation under 77B of the Bankruptcy Act ordered to be paid to persons engaged in a prior bankruptcy proceeding of that company. On August 8, 1933, the company was adjudicated a bankrupt on its voluntary petition. Stephen Callaghan and Percival E. Jackson became trustees in bankruptcy on August [fol. 417] 1933, and William M. Greve became a trustee on September 14, 1933. The delay between the date of his election and the date of taking office was due to his rejection by the referee because of a supposed disqualification. After the referee's ruling he employed Cullen & Dykman as his personal counsel and was reinstated by the court. On June 22, 1934, the bankruptcy proceedings were superseded by proceedings for reorganization under 77B, and the former trustees in bankruptcy were appointed trustees in reorganization. Messrs. Goldwater & Flynn were attorneys for the trustees in each proceeding. The tenure of the trustees in bankruptcy and their counsel lasted about ten months and the amounts to which they are entitled as compensation for services during that period are in dispute on the present appeal. There is also before us the question of the compensation of Robert P. Levis, the attorney for the bankrupt; of Cullen & Dykman, who performed legal services in securing the reinstatement of William M. Greve as trustee and of William Stitt, who as referee was in charge of the bankruptcy proceeding.

The referee awarded compensation to the persons engaged in the bankruptcy proceeding other than himself and submitted to the District Judge the question of the amount of his own compensation. The Judge entered an order fixing the compensation of the referee at $25,000 and approving the awards made by the latter to the other persons. He fixed them at the same amounts except in the case of the three trustees in bankruptcy whose award he raised from $60,000, allowed by the referee, to $90,000. After this was done the same judge made an order in the [fol. 418] 77B proceeding directing the payment of these allowances out of the estate of the debtor. As finally ordered they were as follows:

To the trustees in bankruptcy	$90,000.00
To Goldwater & Flynn, attorneys for the trustees in bankruptcy	75,000.00
To Robert P. Levis, attorney for bankrupt	10,000.00
To Theodore Stitt, referee	25,000.00
To Cullen & Dykman, attorneys for William M. Greve, for services and disbursements prior to his qualifying as trustee	2,474.35

The Reconstruction Finance Corporation, a large creditor of Allied Owners Corporation, seeks by this appeal to have the allowances to the trustee, their attorneys, and the attorney for the bankrupt reduced, and those to the referee and Messrs. Cullen & Dykman entirely eliminated.

The appellant objects to the allowance to the trustees not only because it is excessive, but because their compensation was governed by Section 48 (a) of the Bankruptcy Act and, under that section, they were limited to "such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed by the court, not to exceed six percentum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars, and less than ten thousand dollars * * *". They may also, under Section 48 (e) receive an additional one per centum if, as here, they conduct the business. If Section 48 (a) and (e) had been applied, the trustees in bankruptcy [fol. 419] would have been limited to the statutory fees on $731,425.57 cash turned over by them, or $14,628.50. But it is argued that their compensation was subject to no such limitations and that the language of 77B (i) leaves the amount of compensation for services in the prior bankruptcy proceeding to the discretion of the judge in the reorganization proceeding guided only by the "rule of reason". In our opinion, however, Section 48 (a) fixes the bounds of the fees which the trustees in bankruptcy can claim.

We have discussed the application of 77B (i) in Matter of New York Investors, Inc., — Fed. (2d) so far as it relates to the fixing of fees in a prior equity receivership. The principles involved where the prior insolvency proceeding is in bankruptcy are the same. Section 77B (i) pro-

vides that if a receiver or trustee has been appointed by a federal, state or territorial court and if thereafter a reorganization proceeding under 77B supervenes "the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trutsee. * * *" The foregoing section, in our opinion, requires that the prior insolvency court shall fix [fol. 420] allowances and the reorganiaztion court shall provide for their payment in so far as they are found to be "reasonable". It seems quite unlikely that such a provision made, as we believe, in order that the reorganization court might benefit by the experience of the prior court and its familiarity with the details of the business, was intended to leave the prior court free (within its statutory limitations) to fix conclusively any allowance it might deem reasonable. No such freedom had existed where ordinary bankruptcy had succeeded a state receivership. Taylor v. Sternberg, 293 U. S. 470; Gross v. Irving Trust Co., 289 U. S. 342; Hume v. Myers, 242 U. S. 827. We think it plain that the words "equitable" and "reasonable" were intended to mean "reasonable" in the eyes of the reorganization court, and were to serve only as a check by the 77B court on payments which might affect the proposed reorganization unfairly. If the parties whose compensation was fixed by the prior insolvency court felt aggrieved they would seem to have had an obvious remedy by an appeal from the court which had fixed their compensation.* Under 77B (i) the reorganization court is given power to pay allowances which have been fixed by the prior court only to the extent that they are found reasonable. Nothing

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* See unreported decision in In re National Department Stores, Inc., (D. C. Del. 1935), where Judge Nields, as judge of the reorganization court, withheld an order for payment of allowances granted by the Pennsylvania district court until it appeared whether an appeal had been taken or, if taken, disposed of.

[fol. 421] in the language of the subdivision suggests the removal of any restriction which may exist upon the prior court in the determination of allowances. Indeed it is impossible to imagine that court awarding compensation in excess of limitations imposed by a statute to which its orders are made subject. It seems equally unlikely that the reorganization court should be empowered by mere implication to make allowances for services by the agencies of another court which the statutes governing the action of that court forbid.

Judge Goddard in Matter of Paramount Publix Corp., December 10, 1934 (unreported), held that Section 77B of the Bankruptcy Act did not enlarge the fees which might be granted under Section 48 (a) to trustees in bankruptcy and we think his decision was entirely correct. In In re National Dept. Stores, Inc., supra, Judge Nields recently held that under 77B (i) the reorganization court had no power to revise allowances fixed by the prior court. With all due respect, we cannot agree with an interpretation of the subdivision that would seem to make the words "equitable" and "reasonable" mere exhortations to the prior insolvency court which could result in no effective control by the reorganization court over excessive allowances. We believe that it was the purpose of Congress to lessen the cost of insolvency proceedings which have long been regarded as too great. Cf. remarks of Cardoza, J., in Realty Associates Corp. v. O'Connor, 294 U. S. —.

It is argued that Section 77B (k) makes Section 48 (a) inapplicable to the prior bankruptcy proceeding. This is plainly unsound. Subdivision (k) in terms relates only to "proceedings instituted under this Section 77B". It pro-
[fol. 422] vides that certain sections of the Bankruptcy Act, including Section 48, shall not "apply to proceedings instituted under 77B unless and until an order" of liquidation has been entered. This means that the judge fixing fees for services in a 77B proceeding shall not be limited by Section 48, and not that the bankruptcy judge in fixing fees in that proceeding is not so bound.

It has been suggested that the trustees might be allowed compensation larger than $14,628.50 by calculating their commissions on the value of property as well as "moneys disbursed or turned over to any person" upon the analogy of In re Toole, 294 Fed. 975, and In re Kessler (unreported

decision in the Southern District of New York, July 16, 1918). But neither of these decisions was made upon facts like the present and, if sound, each is limited to cases where it can be said that there is a constructive disbursement of moneys by turning over property at an agreed valuation. Here the commissions had to be figured upon cash disbursed. In re Detroit Mortgage Corp., 12 Fed. (2d) 889 (C. C. A. 6), certiorari denied 273 U. S. 713; American Surety Co. v. Freed, 224 Fed. 333 (C. C. A. 3). While we should allow a substantially larger compensation if we were at liberty to disregard Section 48 (a) the amount awarded by the District Court was plainly excessive. The services of the trustees only lasted ten months, were in many respects preliminary to a reorganization and were far less burdensome than those of their counsel. If the reorganization succeeds they will be entitled to substantial compensation in the 77B proceedings. [fol. 423] We see no reason under present circumstances to suspend the payment of allowances to either the trustees or their counsel for work which has been completed. We award to the former $14,628.50, instead of the $90,000 granted by the District Court.

The next item to be considered is the compensation of Messrs. Goldwater & Flynn, the attorneys for the trustees in the bankruptcy proceeding. The value of the assets of the bankrupt based on the statement of its accountants as of December 31, 1932, was $18,161,470.38. This, of course, did not represent the realizable value at the date of bankruptcy and the properties were subject to mortgages amounting to about $11,662,000. Among the principal properties of the estate were seven moving picture theaters and a note of Ringling Bros. in which its participation interest was $828,000. In addition to this there was cash on deposit in various banks and trust companies aggregating $341,414.22. The bankrupt was a subsidiary of New York Investors, Inc., which was in the hands of receivers in equity, and as such was involved in its complicated affairs. One of the most important matters that the attorneys had to attend to arose out of two actions pending on behalf of the bankrupt to recover monthly instalments of purchase price on three of the theatre properties from Loew's Theater & Realty Corporation and Loew's, Inc. The total amount sued for was nearly $300,000. Many complicated

questions of law and fact were involved in these litigations in which answers and counterclaims had been interposed, and the cases were prepared for trial by Messrs Goldwater [fol. 424] & Flynn. They were finally settled, shortly after the trustees under 77B were appointed, by means of a guaranty by Loew's, Inc., of the aggregate amount payable under the instalment contracts. Undoubtedly the settlement was largely due to the preparation of the cases for trial and the guaranty of some $12,000,000 of future instalment payments is said to be good. Claims for about $23,000,000 prepared by the attorneys were asserted by the trustees against Paramount Publix Corporation based on alleged damages because of breach by the latter of contracts for the purchase of theatres. The claim against Paramount were settled long after the termination of this proceeding. The Manufacturers Trust Company, which was trustee under a trust deed that secured a large bond issue, was dissuaded from foreclosing mortgages covering the theatres and this made it possible to proceed with the actions against Loew's Theatre & Realty Corporation and Loew's, Inc., and finally to settle them. These and many other important matters such as litigation over the Ringling note requiring skill and experience are said to have occupied one or more of the partners in Goldwater & Flynn and two of their legal assistants for some 4508 hours, of which 3023 were those of their assistants. Many of the things done by these lawyers, as is always the case, were routine matters, many were matters of large importance, many were of a sort preliminary to the reorganization, which has not yet been completed. We think $50,000 is a reasonable compensation for these attorneys and we award that amount, instead of $75,000, to which is to be added their disbursements of $1247.80 directed to be paid by the District Judge.

[fol. 425] The attorney for the bankrupt was allowed $10,000 for his services. His most important services were advising the corporation about going into bankruptcy, preparing the petition, schedules, amended schedules and notices to banks, asking for the immediate appointment of a trustee and taking steps, that were evidently successful, to prevent the expense of a receiver. These things were for benefit of the estate and properly chargeable to it. His other services in attending creditors' meetings and examinations

under Section 21 (a), supporting the proceeding of Mr. Greve for reinstatement as trustee, acquainting the trustees and their counsel with the previous business of the bankrupt, making arguments in connection with the Ringling note, arguing against the attempted foreclosure by the Manufacturers Trust Company and Realty Associates, Inc., negotiating with the Loew Interests and filing the petition under 77B, are not matters for which compensation can properly come from the bankrupt estate. Undoubtedly the preparation of the schedules was a difficult matter requiring much time, labor and skill, but an allowance of $5000 is, in our opinion, adequate, if not liberal compensation, for all the services chargeable to the estate. We award that amount to the attorney for the bankrupt, instead of the $10,000 granted by the District Court.

The award of $25,000 to the referee was clearly erroneous. We have already shown that the reorganization court was without power to increase allowances fixed by the prior court and that the prior court was limited by the provisions of the Bankruptcy Act. Under Section 40 (a) of that act referees are only entitled to "a fee of fifteen dollars * * * [fol. 426] in each case * * * and twenty five cents for every proof of claim filed for allowance * * * and from estates which have been administered before them one per centum commission on all moneys disbursed to creditors by the trustee * * *". Under Section 40 (a) the referee here was limited to a fee of $15 and his filing fees and under Section 72 could not "in any form or guise * * * receive any other or further compensation".

The award of $2,474.35 to Cullen & Dykman cannot stand. They performed legal services for Mr. Greve in procuring his reinstatement after the referee declined to approve his election by the creditors. But he was not trustee at the time the services were performed. They were performed for him personally and though they doubtless resulted in a benefit to the estate when the selection of a good trustee was thereby secured, it was not the sort of benefit which can be the basis of a charge against the fund in the hands of the trustees. The situation resembles that in Weed v. Central of Georgia Ry. Co., 100 Fed. 162, (C. C. A. 5), where an allowance was sought by counsel for an intervening creditor for securing the appointment of a co-receiver. The application was denied, the court saying: "That kind of serv-

ice is certainly such a service as should be paid by their clients."

The orders are modified as to Stephen Callaghan, Percival E. Jackson, William M. Greve, Goldwater & Flynn and Robert P. Levis, and reversed as to Theodore Stitt and Cullen & Dykman in accordance with this opinion.

[fol. 427] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 29th day of July, one thousand nine hundred and thirty-five.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

In the Matter of ALLIED OWNERS CORPORATION, Bankrupt, Debtor; RECONSTRUCTION FINANCE CORPORATION, Appellant

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and hereby are modified as to Stephen Callaghan, Percival E. Jackson, William M. Greve, Goldwater & Flynn and Robert P. Levis, and reversed as to Theodore Stitt and Cullen & Dykman in accordance with the opinion of this court with costs to the appellant.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 428] [Endorsed:] United States Circuit Court of Appeals. Second Circuit. In re Allied Owners Corporation. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 1, 1935. William Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of Allied Owners Corporation. Opinion. Augustus N. Hand, C. J.

[fol. 429] UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

In the Matter of ALLIED OWNERS CORPORATION, Bankrupt,

In the Matter of ALLIED OWNERS CORPORATION, Debtor,

RECONSTRUCTION FINANCE CORPORATION, Appellant,

against

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON and WILLIAM M. GREVE, Individually and as Trustees in Bankruptcy and as Trustees in Reorganization of Allied Owners Corporation, Goldwater & Flynn, Robert P. Levis, Cullen & Dykman and Theodore Stitt, Appellees

PETITION FOR REHEARING

This petition for a rehearing by Theodore Stitt, one of the appellees, is directed to that part of the Court's deci-[fol. 430] sion holding that under Section 40a and Section 72 of the Bankruptcy Act, the Referee is limited to a fee of $15.00 and his filing fees.

It is respectfully urged that a reconsideration of the facts in the light of Sections 40a, 40c, and 77B, paragraph (i), will justify a rehearing of this cause.

The decision referred to does not mention Section 40c. It quotes part of Section 40a, omitting the concluding clause of the same. It is this concluding clause of Section 40a, together with Sections 40c and 77B (i) upon which the Referee based his application for allowance which was approved by the District Judge and ordered paid.

Petitioner now invites reconsideration by the Court of the order of the District Judge fixing his compensation in the light of Sections 40 and 77B (i).

Two questions present themselves for rehearing. They are:

(1) Is the Referee in prior bankruptcy administration entitled to commissions on the amount to be paid to credi-

tors on the confirmation of reorganization plan under Section 77B?

(2) If the first question is answered in the affirmative, what is the amount upon which he is entitled to compute commissions, and to what part of said commissions is he entitled, the reference having been revoked before its conclusion?

[fol. 431] In view of the addition of Section 77B to the Bankruptcy Act since the commencement of the bankruptcy proceeding, the new interpretation of Section 40 with reference to Referee's commissions (Realty Associate Securities Corporation against O'Connor, 294 U. S. —, 55 Sup. Ct. 661) made since the Referee's allowance was fixed by the District Judge, and confirmation of reorganization plan also since the allowance was made, I respectfully submit the following chronological statement:

July 1, 1898:

Section 40 enacted and amended in 1903 to provide for one per cent commissions on money disbursed to creditors in place of on dividend.

August 8, 1933:

Allied Owners Corporation adjudicated bankrupt and referred to Referee Stitt.

April 3, 1934:

Realty Associates Securities Corporation, 6 Fed. Supp. 549. District Court fixed Referee's commissions on market value of bonds issued on composition in place of face amount of bonds.

June 7, 1934:

Section 77B enacted.

June 22, 1934:

Allied Owners Corporation's petition under Section 77B filed and approved. Subsequently Referee Stitt was designated as Special Master on claims and countersignature of checks. Oscar A. Lewis, Esq., was designated as Special Master on plan of reorganization, on consummation thereof after its confirmation, and on the adjudication of all large claims.

[fol. 432] December 3, 1934:

Realty Associates Securities Corporation, C. C. A., 2nd Cir., 74 Fed. (2nd) 61. Held, that Referee's commissions should be computed on face amount of bonds issued on composition.

March 5, 1935:

Referee filed application for allowance in the sum of $25,000.00 for services rendered from August 8, 1933, to June 22, 1934, the date of the filing of 77B petition. This amount consisted of $23,977.00 commissions or 35⅖% of full commissions computed at ½% of total amount of undisputed claims and the sum of $1,023.00 for 4,092 claims filed at 25 cents per claim. The Referee followed In re LeBolt & Co., Northern District of Illinois, Bankruptcy No. 55997, Reorganization No. 56413, reported in Bankruptcy Law Service of Commercial Clearing House, Inc., Loose Leaf Service Division of the Corporation Trust Company at page 1137, division No. 3026. The Referee's report in that case was affirmed by the Court, September 20, 1934, and is quoted in full at the end of this petition (Appendix A). While the method of computation adopted in the LeBolt case was used by me, attention is called to the fact that I asked for only 35⅖% of the full commissions as against 50% asked and allowed in that case.

March 11, 1935:

Referee's application allowed in full by Judge Inch.

March 20, 1935:

Order to show cause signed by Judge Inch as to why Referee's allowance should not be reduced on the appli- [fol. 433] cation of Reconstruction Finance Corporation, a creditor.

April 29, 1935:

Realty Associates Securities Corporation v. O'Connor, 294 U. S. —, 55 Sup. Ct. 661. Held, that the market value of bonds issued to creditors was the present value of the promise of the debtor as of the date of the composition.

June 13, 1935:

Allied Owner's reorganization plan confirmed. No cash is being paid under the plan. Creditors are being paid in full on the face amount of allowed claims by the issuance

of new bonds with deferred maturity and reduced interest to First Mortgage bondholders and debenture bondholders, by the issuance of third lien notes to creditors secured by third mortgage and unsecured creditors. Additional security for out-of-town theater mortgage bondholders.

May 13, 1935:

Order made by Judge Inch denying application of Reconstruction Finance Corporation to reduce Referee's allowance.

July 22, 1935:

Decision of C. C. A., 2nd Cir., reversing Judge Inch's order of March 11, 1935, allowing Referee $25,000.00 and fixing compensation at $15.00 deposited with clerk and 25 cents per claim filed.

[fol. 434] Is the Referee Entitled to Commissions on the Amount to be Paid Creditors Under Reorganization Plan?

From the above recital it appears that the District Judge allowed commissions to the Referee on the amount to be paid creditors upon the confirmation of the plan of reorganization and determined the part thereof (35⅔%) to be paid to him for his work up to the revocation of the reference.

The plan of reorganization was a composition. Matter of O'Gara Coal Co., bankrupt, 260 Fed. 742.

The composition confirmed in Realty Associates Securities Corp. v. O'Connor, supra, included a reorganization of the company. In fact, the composition had many features similar to the Allied Owners reorganization plan and either could have been carried through under Section 12 or 77B.

Upon the dismissal of a bankruptcy petition called a "quasi" composition, otherwise known as a common law composition, the Referee was allowed commissions on moneys already disbursed to creditors. Fielding v. Shands, 210 Fed. 889.

To construe a reorganization plan to be a composition as that term is used in Section 40a is not at variance with Section 72 reading as follows:

"That neither the referee, receiver, marshal, nor the trustee shall in any form or guise receive, nor shall the court

[fol. 435] allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act."

The construction urged does not in any form or guise provide other or further compensation. It provides commissions on the amount to be paid to creditors upon the confirmation of a composition called a plan of reorganization and nothing more. It is not "other or further" compensation but is specifically provided for in Section 40a.

In discussing Section 40a in Realty Associates Securities Corp., supra, Judge Cardozo says:

"In cases of composition the principal is 'the amount to be paid to creditors upon the confirmation,' and before we can compute what is due we must know what payment is. *The ascertainment of that fact, like the ascertainment of facts generally in the discharge of the judicial function, is a process that must be flexible and broad enough to keep all the circumstances in view. In weighing their significance a court will not forget that Congress meant to hit the evil of extravagance, and that the meaning of its words, if doubtful, must be adopted to its aim.* * * *"

The words I have italicized would seem to require that the Court have in mind that Congress intended to provide (not deny) compensation to Referees by way of commissions on distribution to creditors either by liquidation or by settlement called composition.

Certainly to deny compensation to the Referee for serv- [fol. 436] ices extending over a period of ten months where a reorganization plan has been confirmed could not be said to contribute to the aim of "hitting at the evil of extravagance."

If the plan of reorganization had failed, the reorganization judge would have directed liquidation under Section 77B (c) (8) and could have referred the case to this Referee under 77B (k) (1). In that event, the Referee would ultimately have received his commissions on money disbursed to creditors under Section 40.

If the Judge had provided for liquidation without a reference to the prior Referee, it is apparent that Section 77B (i) would take care of awarding part commissions based on money paid to creditors by means of an order deemed "equitable."

I have not been able to find any reported decision where commissions have been denied to a Referee on distribution to creditors through liquidation or settlement except one. In re Stillwell, 12 F. (2nd) 205. There the Referee was guilty of misconduct.

There is annexed to this petition a list of these reported decisions indicating the nature of the additional or extra compensation sought. (Appendix B.)

[fol. 437] Section 40

Section 40 consists of (a) providing compensation for Referees who administer an estate to final liquidation or settlement, (b) for Referees where a case is transferred from one Referee to another in the course of administration and providing for an apportionment of fees between successive Referees, and (c) for Referees where a reference has been revoked before it is concluded, making provision for a determination by the judge as to what part of the fee and commissions shall be paid for partial administration.

Section 40a provides compensation as follows:

1. $15 in all cases except so-called pauper petitions.

2. 25 cents for every proof of claim filed for allowance where there are assets to pay the same.

3. One per cent commissions on money paid to creditors in the liquidation of the estate.

4. One-half of one per cent on the amount to be paid to creditors upon the confirmation of a composition.

Paragraph (b) of Section 40 provides for apportionment of fees and commissions where there has been a transfer from one Referee to another. This paragraph has been used, and there are reported cases where such apportionment has been made.

Paragraph (c) of Section 40 says that the judge shall determine what part of the fee and commissions shall be [fol. 438] paid to the Referee where the reference was revoked before it was concluded. I do not find any reported cases where this paragraph has been availed of. It is submitted that it must refer to a situation where there is no successor Referee because paragraph (b) takes care of that situation. It should also be pointed out that para-

graph (c) is intended to apply where there has not yet been a distribution to creditors or a composition effected because if either of these two things had happened, there would be no occasion for determination of what part of the commissions should be paid to the Referee.

From the foregoing it appears that where there are assets in an estate, and there is a distribution to creditors, either by dividend in liquidation or by payment on the confirmation of a composition, the Referee is to receive the commissions prescribed. If he does not complete the distribution of the estate, express provision is made for him to receive that part of the commissions which the time and effort he has spent on the case entitle him to.

Section 77B, Paragraph (i)

If the view is taken that the Referee is not entitled to commissions under Section 40 because there was no distribution to creditors or confirmation of a composition up to the time that Section 77B petition was filed and approved and further that the confirmation of the plan of reorganization under Section 77B is not to be considered "an amount to be paid to creditors upon the confirmation of a composition," paragraph (i) of Section 77B appears to express a [fol. 439] contrary intent. A reading of the same plainly shows the intent of Congress to work no hardship in the matter of compensation in insolvency proceedings pending at the time Section 77B was added to the Bankruptcy Act.

Paragraph (i) says that the judge in a 77B proceeding "shall make such orders as he may deem equitable" for the payment of allowances in the prior proceeding as may be fixed by the prior court. Not satisfied with making provision for allowances where an insolvency proceeding is cut short by a 77B proceeding, Congress then proceeds to make provision for the payment of allowances where the reorganization is unsuccessful and the petition is dismissed or the estate goes into liquidation. The word "equitable" used here twice must be taken to mean that Congress wished equity done in the matter of allowances where either proceeding fails to reach a final conclusion.

It seems a reasonable view to take that if an order is made by the reorganization judge in this case holding that the bankruptcy Referee is entitled to no commissions, where a plan of reorganization is successfully consummated and

a distribution made to creditors, such order could not be deemed equitable, and that the judge in making it would defeat the express intent of Congress, as provided in paragraph (i).

What Is the Amount Upon Which Commissions Are to Be Computed?

The Referee was handicapped in making his application [fol. 440] for allowance by reason of the fact that no plan of reorganization had been approved or confirmed at the time his application was made. In the judgment of the Referee it was desirable at that time, from the standpoint of expeditious administration, to apply for and have allowances fixed for services rendered prior to the 77B proceeding in order to avoid delay.

Commissions were computed at the rate of one half per cent on the total amount of undisputed claims filed with the Referee. At that time the case of the Realty Associates Securities Corporation v. O'Connor, supra, handed down April 29, 1935, had not been decided. The law was then, as found by this Court of Appeals, that the Referee was entitled to commissions on the face amount of bonds issued to creditors. Nevertheless, the Referee, after he had so computed his commissions, asked for only 35 2/5 per cent of the full amount computed at one-half of one per cent.

The decision of the U. S. Supreme Court in the O'Connor case having intervened, I have examined the confirmed plan of reorganization. I have obtained from Oscar A. Lewis, Esq., Special Master, the annexed letter (Appendix C) describing the distribution features of the plan. I have obtained from N. Y. Stock Exchange House of B. H. Roth & Co., the annexed letter (Appendix D) giving market quotations on securities involved in the distribution under the plan as of the date of confirmation, June 13th, 1935, and also at the time of the commencement of the bankruptcy proceeding, August 8th, 1933.

Based on the foregoing, the following appears to be the [fol. 441] amount upon which commissions should be computed:

First Mortgage 6% bonds maturing 1945 replaced by new bonds with interest at 4%, with the possibility of an additional 1%, maturing July 1, 1958, face amount $9,027,000.00, at 72½, mean market 6/13/35	$6,544,575.00

Debenture 6% bonds maturing 1931-1940 replaced by new bonds with interest at 2% with the possibility of an additional 3%, maturing July 1, 1963, face amount $1,748,500.00, at 34, mean market 6/13/35	594,490.00
Third Mortgage made to N. Y. Investors and pledged with R. F. C. third lien notes, interest at 2% with possibility of additional 3%, principal payable July 1, 1963	490,455.45
Notes made to Prudence Co. and pledged with R. F. C., third lien notes as above	1,000,000.00
Notes made to Prudence Co. and pledged with R. F. C., third lien notes as above	200,000.00
First Mortgage, Fremont and Glens Falls, additional security	238,000.00
Second Mortgage, Fremont, additional security	25,000.00
Second Mortgage, Glen Falls, additional security	25,000.00
Thompson-Starrett claim, third lien notes as above	409,865.08
Total	$9,527,385.53

[fol. 442] Commissions at ½% on this total are $47,636.93. It thus appears that commissions computed on the revised figures based on the plan as confirmed and the security market quotations are approximately twice the sum of $23,977.00 originally applied by and allowed by the District Judge. Apportioning one-half of that amount to services before the 77B proceeding would fix the allowance at $23,818.43.

Although the United States Supreme Court expressly refused to hold that Referee O'Connor was entitled to as much as the District Court awarded to him, the Court did say that he was receiving full compensation, and refused to disturb the amount awarded by the District Judge on the ground that there had been no appeal by the debtor, or any creditor. In this case there has been no appeal by the debtor.

If upon this appeal the Court should find that the application is premature for the fixing of final compensation, it is respectfully suggested that an allowance on account

might be made on the authority of this Court's decision handed down July 22, 1935, in New York Investors, R. F. C. v. Endelman, et al., where it is said:

"While 77B does not in terms provide for ad interim allowances, we have no doubt that the court may employ any fair method to determine what allowances are reasonable and to that end may authorize payments on account if it is otherwise difficult to determine what under the circumstances is proper compensation."

A further suggestion, respectfully submitted, is that this Court, provided it feels the record before it is insufficient [fol. 443] to determine in dollars and cents the Referee's commissions, might modify the order of the District Judge to provide that the Referee's compensation is to be computed by the District Judge in connection with the final consummation of the reorganization plan on the basis of $25,000 or such other amount as this Court feels is fair and reasonable; and in no event to exceed one-half of one per cent of the amount distributed to creditors under the reorganization plan to be computed under the general principles of computation as laid down by the United States Supreme Court in the O'Connor case.

Conclusion

In reaching its decision, this Court has failed to consider that part of Section 40a of the Bankruptcy Act upon which the Referee's application for allowance was in part based and has also failed to consider Sections 40c and 77B (i). The decision reverses the order of the District Judge on the theory that the Referee had made application for commissions on money disbursed to creditors by the trustees whereas the Referee's application shows that commissions were computed on the amount to be paid to creditors upon confirmation of a composition.

Wherefore your petitioner prays for a rehearing herein for the reasons stated.

Theodore Stitt, Appellee Petitioner.

[fol. 444] I hereby certify that the foregoing petition for rehearing is filed in good faith, and that in my opinion the petition is well founded and the relief therein prayed should be granted.

August 21, 1935.

Theodore Stitt, pro se.

[fol. 445] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of ALLIED OWNERS CORPORATION, Bankrupt,

In the Matter of ALLIED OWNERS CORPORATION, Debtor,

RECONSTRUCTION FINANCE CORPORATION, Appellant,

against

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON and WILLIAM M. GREVE, Individually and as Trustees in Bankruptcy and as Trustees in Reorganization of ALLIED OWNERS CORPORATION, GOLDWATER & FLYNN, ROBERT P. LEVIS, CULLEN & DYKMAN and THEODORE STITT, Appellees.

Before Manton, Swan and Augustus N. Hand, Circuit Judges

Per CURIAM:

Petition for rehearing denied.

——— ———, Circuit Judges.

Filed Sept. 16, 1935.

[fol. 446] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 18th day of September, one thousand nine hundred and thirty-five.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

In the Matter of ALLIED OWNERS CORPORATION, Bankrupt,

RECONSTRUCTION FINANCE CORPORATION, Appellant,

A petition for a rehearing having been filed herein by counsel for the Trustee;

Upon consideration thereof it is ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 447] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Allied Owners Corporation. Order. United States Circuit Court of Appeals, Second Circuit. Filed Sep. 18, 1935. William Parkin, Clerk.

[fol. 448] UNITED STATES OF AMERICA,
Southern District of New York:

I William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 447, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, In the Matter of Allied Owners Corporation, Bankrupt, Debtor, Reconstruction Finance Corporation, Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 30th day of September, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the said United States the one hundred and sixtieth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals for the Second Circuit.)

[fol. 449] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 539

ORDER ALLOWING CERTIORARI—Filed December 9, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 450] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 540

ORDER ALLOWING CERTIORARI—Filed December 9, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 40,093, 40,094. U. S. Circuit Court of Appeals, Second Circuit. Enter Percival E. Jackson. Term No. 539. Stephen Callaghan, Percival E. Jackson and William M. Greve, Individually and as Trustees, etc., petitioners, vs. Reconstruction Finance Corporation. Enter Theodore Stitt, pro se. Term No. 540. Theodore Stitt, petitioner, vs. Reconstruction Finance Corporation. Petitions for writs of certiorari and exhibit thereto. Filed October 24, 1935. Term Nos. 539, O. T., 1935; 540, O. T., 1935.

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Supreme Court of the United States

OCTOBER TERM, 1935

No. 539

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON and WILLIAM M. GREVE, individually and as trustees in bankruptcy and as trustees in reorganization of ALLIED OWNERS CORPORATION,

Petitioners,

against

RECONSTRUCTION FINANCE CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PERCIVAL E. JACKSON,
Counsel for Petitioners.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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Supreme Court of the United States

OCTOBER TERM, 1935.

No.

IN THE MATTER

of

ALLIED OWNERS CORPORATION,

Bankrupt.

IN THE MATTER

of

ALLIED OWNERS CORPORATION,

Debtor.

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON and WILLIAM M. GREVE, individually and as trustees in bankruptcy and as trustees in reorganization of ALLIED OWNERS CORPORATION,

Petitioners,

against

RECONSTRUCTION FINANCE CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON and WILLIAM M. GREVE, individually and as trustees in bankruptcy and as

trustees in reorganization of ALLIED OWNERS CORPORATION by Percival E. Jackson, attorney and counsel, pray and each of them prays that a Writ of Certiorari issue to review the decree (R., p. 423) of the United States Circuit Court of Appeals for the Second Circuit made in the above entitled matter on the 29th day of July, 1935, which decree modifies (1) that portion of an order in bankruptcy made by the United States District Court for the Eastern District of New York, entered on March 11, 1935, fixing the compensation of the above named trustees in bankruptcy, (2) that portion of an order in a proceeding under Section 77B of the Bankruptcy Act, made by the District Court, entered on March 11, 1935, directing the payment of the said compensation to the said trustees, and (3) an order of the District Court, entered on May 13, 1935, denying a motion of the Reconstruction Finance Corporation to vacate each of the said orders (R., pp. 307, 311, 386). The decree of the Circuit Court of Appeals modified the orders of the District Court by reducing the compensation of the trustees in bankruptcy from the aggregate amount of $90,000, as fixed by the order of the District Court entered March 11, 1935, to the sum of $14,628.50 for the three trustees, being two per cent. of the sum of $731,425.57 cash turned over by the trustees in bankruptcy (R., pp. 420, 423).

Opinions Below.

The opinions of the District Court are not reported but are printed in the Record (R., pp. 305, 377).

The opinion of the Circuit Court of Appeals is not yet reported but is printed in the Record (R., p. 415).

Jurisdiction.

The decision of the Circuit Court of Appeals was rendered on July 22, 1935, and the order for the mandate thereon was entered on July 29, 1935. The mandate was issued on September 18, 1935.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of Congress of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

Question Presented.

Whether Section 48 of the Bankruptcy Act applies to and determines the compensation for services of trustees in a bankruptcy proceeding when that proceeding is superseded by a proceeding under Section 77B.

This question and point was raised by the Reconstruction Finance Corporation, a creditor of the Debtor, before the Circuit Court of Appeals.

Statement of Facts.

On August 8, 1933, Allied Owners Corporation was adjudicated a bankrupt on its voluntary petition (R., p. 141). On August 25, 1933, Stephen Callaghan and Percival E. Jackson became trustees in bankruptcy, and on September 14, 1933, William M. Greve became a trustee (R., p. 6).

On June 22, 1934, the bankruptcy proceedings were superseded by proceedings for reorganization under Section 77B and the former trustees in bankruptcy were appointed trustees in reorganization (R., p. 3).

Subsequently, an application for allowances for services in the bankruptcy proceeding was filed by the trustees with the Referee in Bankruptcy, and the Referee thereupon gave notice to creditors of a hearing to be held upon said application and other applications, including his own application for services in the bankruptcy matters (R., pp. 264-265). At the hearing before the Referee, the Reconstruction Finance Corporation and other creditors appeared and objected to the proposed allowances as illegal and excessive (R., pp. 287-288).

The Referee thereafter filed his report wherein he recommended allowances to the trustees in bankruptcy in the aggregate sum of $60,000, to be equally apportioned between them (R., p. 300). The Referee in his report expressed the opinion that Section 77B, subdivision (i) gives the Court appointing prior trustees authority to fix a *reasonable* allowance for their services; and that the foregoing amount was a reasonable allowance (R., pp. 293, 303). He stated that if Section 48 of the Bankruptcy Act applied, the maximum commissions for the trustees would be $14,628.50, if based on "cash turned over", or $284,119.92 if based "on money and property turned over" (R., pp. 299-300).

On March 8, 1935, Judge Inch filed a memorandum increasing the aggregate allowance to the trustees from $60,000 to $90,000, and approving the other allowances recommended by the Referee; and on March 11, 1935, an order was entered accordingly (R., pp. 306, 307); and on the same day an order was made by Judge Inch in the reorganization proceeding directing payment of the allowances (R., p. 311).

Upon application of the Reconstruction Finance Corporation that the said orders (and another order fixing the allowances for services of the Referee) be vacated, a hearing was had before Judge Inch, who filed his opinion on May 8, 1935, denying the application of the Reconstruction Finance Corporation (R., p. 377); and on May 13, 1935, an order was made denying the motion (R., p. 386).

In his opinion upon the denial of the motion, Judge Inch said, of reorganization proceedings under Section 77B:

> "The plainly expressed purpose of Congress in affording this new form of relief to distressed debtors, is to avoid the liquidation of its property which usually follows a bankruptcy or an equity suit with Receivership, and giving opportunity for a rehabilitation of the debtor. Unusual and broad powers are reposed in the court for the above purpose. * * *
>
> "Suffice it to say that had the estate been liquidated no such controversy as this in regard to fees could have arisen; but because the trustees in bankruptcy, having in mind the hoped for rehabilitation of the debtor, steadfastly devoted their skill and best efforts to what thereafter turned out to be the solid foundation of the present acceptable plan, they have been exposed to the criticism that they can only be allowed fees based on a liquidation.
>
> "This is contrary to the very purpose of 77-B which removes the temptation of bankruptcy trustees to reduce to cash the estate and assures them of a reasonable allowance even though they have been prevented from liquidating the estate" (R., pp. 380, 382).

Upon appeal of the Reconstruction Finance Corporation from the orders of March 11, 1935, and the order of May 13, 1935, the Circuit Court of Appeals held (in an opinion

by Judge A. N. Hand) that Section 48 (a) and (e) applied and fixed the amounts of the fees which the trustees in bankruptcy could receive; and reduced the allowance to the three trustees to the sum of $14,628.50 (R., pp. 420, 423). In its opinion the Circuit Court of Appeals said:

> *"While we should allow a substantially larger compensation if we were at liberty to disregard Section 48(a)* the amount awarded by the District Court was plainly excessive. The services of the trustees only lasted ten months, were in many respects preliminary to a reorganization and were far less burdensome than those of their counsel. If the reorganization succeeds they will be entitled to substantial compensation in the 77B proceeding." (Italics added.)

The question here presented is solely a question of law; it is not one of the reasonableness or unreasonableness of the particular allowances made to the trustees herein,—if the petitioners are right in their view of the law, the question of what are reasonable amounts may be determined later in the Court below.

Specifications of Error to be Urged.

The Circuit Court of Appeals erred:

1. In holding that when a bankruptcy proceeding is superseded by a reorganization proceeding under Section 77B, the Court which appointed the trustees in bankruptcy is not authorized to fix an allowance for their services as such trustees in an amount which the Court deems reasonable, unaffected by Section 48 of the Bankruptcy Act.

2. In holding that Section 48 fixes the limits within which the Court appointing the trustees in bankruptcy must act in fixing fees for their services as such trustees.

Reasons for Granting the Writ.

1. This case involves an important question of Federal Law of general interest. Section 77B constitutes new legislation of great importance, designed to facilitate the reorganization of corporations which are insolvent or unable to meet their obligations as they accrue. It is particularly important in the case of a corporation in bankruptcy, whether in voluntary or involuntary proceedings, where a plan may nevertheless be successfully worked out for its reorganization and continuance. The question here involved affects all cases where bankruptcy proceedings (in which trustees have been appointed) are superseded by proceedings under Section 77B. It is a question that has never been passed upon by this Court; and it is in the public interest that it should be decided by this Court of last resort.

2. Where the property of a corporation in bankruptcy has been taken over by trustees and the bankruptcy proceeding is subsequently superseded by a proceeding for reorganization under Section 77B, it is the intent of the statute (Section 77B, subdivision (i)) that the trustees should receive *reasonable* compensation for their services in the bankruptcy proceeding to be determined in the first instance by the Court which appointed them. The Court of the prior proceeding is evidently called upon to fix the reasonable compensation for the services rendered therein,

in order that the reorganization court may have the benefit of the experience of the prior court in estimating the fair value thereof; but the reorganization court must also pass upon and determine the reasonableness of the allowances in the light of the additional matters (including the proposed plan of reorganization) before the latter court. (*Matter of New York Investors, Inc.*, Circuit Court of Appeals, 2nd Circuit, July 22, 1935). This is the rule that has been applied in the case of an equity receivership in a Federal Court which has been superseded by a proceeding under Section 77B (*Matter of New York Investors, Inc., supra*). No different principle applies where a prior bankruptcy proceeding is superseded by a 77B proceeding.

3. In all cases (whether in the case of equity receiverships in State or Federal courts, or prior bankruptcy proceedings) it is the intent of the statute that the prior receiver or trustee should receive *reasonable* compensation for his services, fixed first by the Court of his appointment and then checked, as to reasonableness, by the reorganization court. The Circuit Court of Appeals has, however, announced a rule herein which in many cases would defeat the purpose of the statute that reasonable compensation should be allowed the prior receiver or trustee, and which would in many instances result in unnecessary hardship and injustice.

4. It would tend to defeat the purpose of Congress in enacting Section 77B if the rule as to compensation of trustees in prior bankruptcy proceedings were as announced by the Circuit Court of Appeals herein. The evident purpose of the statute is *to avoid liquidation;* yet if trustees in the prior bankruptcy proceeding are to be compensated

by commissions upon the amount of money turned over by them, there is a strong incentive to liquidation by transforming the property into money. It was, doubtless, to prevent such a situation that it was provided that the trustees should receive such reasonable compensation as the prior court should fix, to be subsequently checked as to reasonableness by the reorganization court. Trustees in bankruptcy who, having in view the possible successful rehabilitation of the corporation in a subsequent reorganization proceeding under Section 77B, apply themselves and devote their efforts to conserving, so far as possible, the properties and organization of the bankrupt and to avoiding liquidation, would, in many cases, find their efforts rewarded with altogether inadequate compensation, which might have been many times larger had they vigorously promoted the liquidation of the assets. The decision of the Circuit Court of Appeals sought to be reviewed herein thus tends to defeat the purpose of the new legislation. It is greatly in the public interest that the decision should be reviewed by this Court.

5. Under the decision of the Circuit Court of Appeals herein it would be possible for trustees in bankruptcy to act as such over a considerable period of time and perform services of great value to the corporation, and yet receive nothing, or substantially nothing, for their services. That no such inequitable result was contemplated by Congress appears from the language of Section 77B, subdivision (i), wherein it is expressly provided that the Judge in the reorganization proceeding shall make such orders "as he may deem *equitable*" for the payment of such reasonable allowances in the prior proceeding as may be fixed by the Court

appointing the prior trustees. Again, in the same subdivision, it is provided that where a proceeding under Section 77B is dismissed and the debtor's property returned to the prior receiver or trustee, it shall be upon such terms "as the judge may deem equitable," for the protection of obligations incurred by any trustee or trustees appointed in the proceeding and for the payment of allowances therein. The repeating of the word "equitable" in subdivision (i) indicates the intent of Congress that in either case therein provided for the trustees shall receive for their services the reasonable compensation to which they are equitably entitled.

WHEREFORE, your petitioners respectfully request that a writ of certiorari should be granted as prayed.

Dated: New York City, N. Y., October 22, 1935.

STEPHEN CALLAGHAN,
PERCIVAL E. JACKSON,
WILLIAM M. GREVE,
Petitioners.

PERCIVAL E. JACKSON,
Attorney and Counsel for
Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Reference to the opinions of the Courts below, and the grounds of jurisdiction, as well as a statement of the case and the specifications of error to be urged, are contained in the petition.

Summary of Argument.

I.

Section 48 of the Bankruptcy Act is not applicable and does not limit the compensation of Trustees in Bankruptcy where the bankruptcy proceeding has been superseded by a proceeding under Section 77B.

Section 48 has no application where the bankruptcy proceeding does not proceed to its normal termination in liquidation or composition, but is summarily cut off and left incomplete by the intervention of a proceeding under Section 77B.

The attempt to apply Section 48 to a bankruptcy proceeding superseded by a proceeding under Section 77B leads unnecessarily to inequitable, unjust and unreasonable results not contemplated by Congress in the enactment of the later statute.

ARGUMENT.

I.

Section 48 of the Bankruptcy Act is not applicable and does not limit the compensation of trustees in bankruptcy where the bankruptcy proceeding has been superseded by a proceeding under Section 77B.

The Court below held that, while the allowances to the trustees herein under Section 48 were inadequate, and it would have allowed compensation in a substantially larger sum if it were at liberty to disregard Section 48, yet the limitations fixed by that section prevented the award of any larger amount. It is submitted that in this the Court was in error; and that Section 48 is inapplicable and is not controlling where a prior bankruptcy proceeding is superseded by a reorganization proceeding under Section 77B.

Section 48, subdivision (a), provides that "trustees shall receive for their services, payable after they are rendered, * * * such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed by the courts, not to exceed" the percentages therein set forth. Subdivision (e) provides for larger commissions where the trustees conduct the business. Under the preceding section (Section 47) it is the duty of trustees to "collect and reduce to money the property of the estates for which they are trustees" and to close up the estates as expeditiously as compatible with the interests of the parties. Upon completion of the liquidation (which is the primary function and purpose of the ordinary bankruptcy proceeding) and the administration of the estate,

the trustees are to receive the commissions set forth in Section 48 "on all moneys disbursed or turned over to any person, including lienholders, by them." In case of the confirmation of a composition, Section 48 further provides, the Court may allow the trustee, as compensation, "not to exceed one-half of one percentum of the amount to be paid to the creditors on such composition."

Section 48 says that trustees are to receive for their services, "payable after they are rendered," the compensation therein provided; and there can be no doubt that Section 48 was intended to apply, primarily, to completed administrations. The section, in its original form, and as amended in 1903, specifically provided that trustees were to receive "from estates which they have administered" commissions allowed by the courts. It has been said of Section 48, in its present form, that "no compensation is payable [to trustees] until after the services are rendered, *i. e.*, when the administration is closed" (Collier on Bankruptcy, 13th ed., p. 1074).

Section 48, subdivision (a), contains no provision for commissions to trustees where property is turned over by them in kind. In this respect it differs from subdivision (d) of the same section, as to receivers, wherein it is expressly provided that receivers are entitled to commissions on moneys "afterwards realized by the trustees from property turned over in kind by them to the trustees". The evident reason for this difference is that it is the duty of the trustees to liquidate the estate, convert the properties into money, and to disburse or turn over the moneys; and they are to receive commissions, under Section 48, on the moneys so disbursed or turned over; whereas, in the case of receivers, who are temporarily in possession, it is

expected that the property turned over by them to trustees will be largely in kind, as to which a special provision for commissions to receivers is accordingly made in subdivision (d).

Nothing in the provisions of Section 48 as to commissions to trustees, therefore, meets the situation which arises when the bankruptcy proceeding is abruptly cut off and terminated upon the filing and approval of a petition or answer for a corporate reorganization under Section 77B. The latter section provides in subdivision (i) that "if a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court, whether before or after this amendatory act takes effect, a petition or answer may be filed at any time thereafter by the corporation or its creditors as provided in subdivision (a) of this section, and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property."

Thus, if after trustees in bankruptcy have been acting as such for perhaps a considerable period of time, and have become entitled to and taken possession of property of the bankrupt in great amount and value which, however, they have not yet reduced to cash, and while they have substantially no moneys of the bankrupt, a petition or answer for reorganization under Section 77B is filed and approved, the bankruptcy trustees would be required to turn over the property in kind to the trustees in reorganization, or to the debtor himself if no trustees were appointed; and the bankruptcy trustees would (under the provisions of Section 48) receive substantially no compensation for their

services however faithful and valuable to the estate those services may have been.

This situation arises for the reason that while Section 48 provides, as above pointed out, for trustees' commissions in ordinary bankruptcy proceedings (terminating, as they would, in liquidation and distribution, or composition), it was not intended to cover or apply to the new and altogether different proceeding (unknown and unthought of at the time Section 48 was enacted) created by Section 77B.

Section 77B introduced a new element in bankruptcy legislation. Though Section 77B forms part of the Bankruptcy Act, the proceeding for corporate reorganization therein provided for is not, strictly speaking, a bankruptcy proceeding. Through this section (as well, also, as Sections 74, 75, 77 and 80) the Bankruptcy Act is designed to be used as a vehicle for the *"relief of debtors"* (Section 77A), as distinguished from the "liquidation of estates," which was the primary function and purpose of the earlier strict bankruptcy provisions, of which Section 48 forms a part. A clearly drawn distinction exists between those who are adjudicated bankrupts in the ordinary bankruptcy proceedings and debtors who seek relief in proceedings under Section 77B; the section itself, in subdivision (a), specifically provides that the corporation for whose relief the proceeding is brought shall be referred to therein as a "debtor" and not as a "bankrupt."

As was said by Judge Inch in his opinion herein, "the plainly expressed purpose of Congress in affording this new form of relief to distressed debtors, is *to avoid the liquidation* of its property which usually follows a bankruptcy or an equity suit with receivership, and give oppor-

tunity for a rehabilitation of the debtor" (R., p. 380). In *Campbell* v. *Alleghany Corp.*, 75 Fed. (2d) 947, 951 (C. C. A. 4th Ct.), it is said of Section 77B: "Only by the further exercise of the bankruptcy power of Congress could adequate relief be afforded to these distressed debtor corporations and their creditors; and the act in question was passed for the purpose of affording this relief."

Because there was no provision in the previously enacted sections of the Bankruptcy Act (having to do with ordinary bankruptcy proceedings) for the compensation of the trustees in bankruptcy, who are required by this new Section 77B to turn over the property (perhaps for the most part in kind) to the trustees in the reorganization proceeding, a provision for such compensation is found in a further provision of subdivision (i) of Section 77B, as follows: "and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee."

If it were not for this provision of Section 77B, the sole power to fix the allowances of receivers or trustees appointed in prior proceedings would apparently be in the Judge in the reorganization proceeding, the entire property of the debtor corporation having come under his supervision and control (*Gross* v. *Irving Trust Co.*, 289 U. S. 342). The clearly stated purpose of Section 77B, however, is to have the Court in the prior proceeding (being more familiar with the services therein rendered) fix allowances, in such amounts the Court deems reasonable, for the receiver or trustees appointed therein. It is then for

the Judge in the reorganization proceeding to make such orders "as he may deem equitable" for the payment of such "reasonable" allowances as have been fixed by the Court appointing the receiver or prior trustees. Therefore, in the case of prior trustees in bankruptcy, the Bankruptcy Court is first to determine the reasonable amounts to be allowed for their services; but the amounts so allowed must also be reviewed, as to their reasonableness, by the Judge before whom the reorganization proceeding is pending, in the light of the new matters, including the plan of reorganization, pending before him. Thus, the amounts fixed by the Bankruptcy Court as reasonable in view of the services performed might be found by the Judge in the reorganization proceeding to be such that their payment would endanger the success of the plan of reorganization; and he might, therefore, make such an order as he deemed equitable for the payment of amounts found by him to be reasonable.

A correct statement of the rule as to allowances under Section 77B (i) to receivers and trustees in prior proceedings is that suggested in *In re 211 East Delaware Place Bldg. Corp.*, 7 F. Supp. 892, 896 (D. C., Ill.), wherein it is said:

> "It seems to have been intended by Congress that prior receivers and other parties having claims for compensation for administrative services should present their application for fixing such reasonable compensation to the court under whose jurisdiction they were appointed. The proper procedure apparently is for that court to enter an order adjudicating such claims, said action to be followed by the action of the bankruptcy [77B] court in directing the payment of such of the same as shall be found to be reasonable."

This was the view taken by the Court below, of the procedure to be followed under Section 77B (i), in *Matter of New York Investors, Inc.* (Circuit Court of Appeals, 2nd Circuit, decided July 22, 1935), wherein (an equity receivership in a Federal court having been superseded by a reorganization proceeding) it was said: "These provisions [subdivision (i)] were inserted in the act to give the reorganization court the benefit of the experience of the prior court in estimating the fair value of the services."

Though the Court below has adopted the view above expressed in the case of equity receiverships superseded by reorganization proceedings, it has, in the present case, as to a prior bankruptcy proceeding superseded by a reorganization proceeding, placed a different construction on Section 77B (i), which has resulted (as the Court below said) in inadequate compensation to the trustees herein, and which, in other cases, might readily give to trustees in bankruptcy no compensation whatever. The Court adopted this construction because, as it said, it felt constrained to do so by the limitations found in Section 48 of the Bankruptcy Act. The Court below was in error in this respect for the reason, as above pointed out, that there is nothing in Section 48 that applies to or covers the situation created where a bankruptcy proceeding is abruptly interrupted and summarily ended by a subsequent reorganization proceeding.

It is not the contention of the petitioners herein, as the Court below seemed to think, that Section 77B (i) does away with or in any way affects the restrictions or limitations found in Section 48. That section now limits, as before, the allowances in the ordinary or strict bankruptcy proceedings, unaffected by anything in Section 77B (i); while the latter section provides for *reasonable allowances*

to be made in the prior proceedings in cases within the new legislation, to which Section 48 should be held to be inapplicable. The two sections are not inconsistent; each applies to and is controlling in its own field.

The limited construction placed upon Section 77B (i) by the Court below defeats the evident purpose of Congress that *in all cases* (not merely in equity receiverships and in a limited number of prior bankruptcy proceedings) the receiver or trustees appointed in prior proceedings should have *reasonable compensation*,—reasonable (1) with respect to the services rendered, and (2) with respect to their effect upon the reorganization,—and therefore to be passed upon by the judges in both proceedings. The limited construction adopted below leads to inequitable, unjust and unreasonable results. That it was the purpose of Congress that *equitable* provision should be made for the payment of *reasonable compensation* appears from the emphasis placed upon the word "equitable" in subdivision (i) wherein it appears twice in connection with the making of reasonable payments.

A statute should receive a reasonable construction, so as to give effect to the object of the legislature, and if the meaning is doubtful such a construction, if possible, as will not lead to unreasonable results (*People ex rel. Hallock* v. *Hennessy*, 205 N. Y. 301). In construing the provisions of the Bankruptcy Act this Court has said, "We should therefore construe the language of the act so as to effectuate the evident purpose of the legislation, and not so narrowly as to defeat the true intent of Congress." (*Royal Indemnity Co.* v. *American Bond & Mtge. Co.*, 289 U. S. 165, 169.)

When a prior bankruptcy proceeding has been superseded by a reorganization proceeding under Section 77B,

the prior proceeding has abruptly terminated. Nothing remains therein except to fix the reasonable allowances. Where the trustees in bankruptcy have worked hard and faithfully having in mind the possibility of the successful rehabilitation of the debtor corporation, and to that end have devoted their efforts to conserving the corporate property and organization (and not to liquidating the assets, with a view to increasing their commissions) they may have on hand, when the bankruptcy proceeding is interrupted, substantially no cash; and in such case they would receive no compensation for their services, however extended, arduous and faithful they may have been. Such a result, which puts a premium on liquidation, was never contemplated when Section 77B was enacted. The view adopted by the Court below further operates to defeat the purpose of Congress in that it would make it increasingly difficult to procure men of ability and high standing to act as bankruptcy trustees if there were no assurance that they would receive reasonable compensation for their services in the bankruptcy proceedings.

The Court below says in its opinion that it was never intended that the determination of the prior court upon allowances should be conclusive upon the judge in the reorganization proceeding (R., p. 418). This is in accord with the position of the petitioners herein,—the prior court is to fix such allowances for the services as it deems reasonable, and the judge in the reorganization proceeding must review them, in the light of the additional matters before him (including the proposed plan or reorganization), and make an "equitable" order for the payment of "reasonable" allowances.

The Court below suggests that if the parties whose compensation is fixed by the prior court feel aggrieved by the allowances as inadequate, "they would seem to have an obvious remedy by appeal" (R., p. 418). But if the construction placed upon the statute by the Court below is correct, and if trustees (who have rendered extended and valuable services) are allowed only nominal compensation, or nothing at all, because there is substantially no cash (by reason of the limitations contained in Section 48 which the Court has held applicable) then an appeal would be futile; because the appellate court would be subject to the same *statutory limitations*, and could make no additional allowance.

It is also suggested in the present case that, although the allowance made to the trustees is admittedly inadequate, yet as they are also the trustees in the reorganization proceeding, where they will be entitled to substantial compensation, the failure to allow them reasonable and adequate compensation for their services as prior bankruptcy trustees, may in this way in some measure be made up to them (R., p. 420). But it was evidently not the purpose of Congress that the failure to allow trustees reasonable compensation in one proceeding, should be made up to them by proportionately increasing the allowances in, and the burden thus imposed upon, another proceeding. Each proceeding must stand by itself. Moreover, the trustees in the reorganization proceeding may be different persons from the trustees in the prior proceeding; or no trustee at all may be appointed in the reorganization proceeding in which case the statute requires the property to be turned over to the debtor itself.

It is said, in the opinion below, that it was the purpose of Congress to lessen the cost of insolvency proceedings which had long been regarded as too great; and this is undoubtedly so. This is, however, accomplished by the construction placed upon Section 77B, subdivision (i) by the petitioners herein. The statute affords a double check upon the reasonableness of the allowances,—the prior court is first to fix them in such amounts as it deems reasonable, and the judge in the reorganization proceeding is also to pass upon and determine that they are reasonable. These determinations may be further reviewed upon appeal, and modified if the appellate court believes them unreasonably large (*Matter of New York Investors, Inc., supra*). Thus the construction of the statute, for which petitioners contend, facilitates, rather than impedes the economical administration of the debtor's estate and the successful reorganization of the debtor corporation.

The fact should not be lost sight of that it is not now a question of the amounts of the particular allowances in the present case. If they are deemed too large they may be modified by the Court below to such amounts as it may deem reasonable. The question is solely one of law, as to whether the Courts are prevented from allowing reasonable compensation for the services of prior bankruptcy trustees by reason of limitations found in Section 48, which the petitioners believe to be inapplicable.

That Section 48 does not apply to or limit the reasonable allowances to trustees in "proceedings instituted" under Section 77B, is expresaly provided in subdivision (k) thereof, which provides that where in a proceeding instituted under Section 77B an order for liquidation is made, Section 48 applies, but as to all other proceedings under Section 77B

not terminating in liquidation, Section 48 has no application. The express provision of subdivision (k) that Section 48 applies only in said proceedings resulting in liquidation, gives additional support to the view of the petitioners herein that the limitation of trustees' commissions found in Section 48 applies and was intended to apply *only where there is a liquidation*. It may be said, moreover (and this point was also raised by petitioners in the Court below) that Section 77B, subdivision (k), in providing that "none of the sections enumerated in this subdivision (k) [including Section 48] shall apply to proceedings instituted under this section 77B unless and until an order has been entered directing the trustee or trustees to liquidate the estate", was intended to include and to incorporate into the reorganization proceeding under Section 77B the prior proceeding (in which a receiver or trustees had been appointed and which had been superseded by the 77B proceeding) to the extent of excluding the operation of Section 48 therefrom; so that the sole provision of the Bankruptcy Act for the compensation of trustees in a prior bankruptcy proceeding superseded by a proceeding under Section 77B should be that provided in subdivision (i) thereof, above quoted, namely, such reasonable allowance as the court of prior appointment should fix, subsequently approved by the judge in the reorganization proceeding. This construction of subdivision (k) (which was not adopted by the Court below) would give effect to what petitioners believe was its real purpose, that is, to afford to receivers and trustees in all prior proceedings, of whatever nature, whether in State or Federal courts, when superseded by proceedings under Section 77B, reasonable compensation for their services in such prior proceedings.

The decision of the Court below has deprived the petitioners of the reasonable compensation for their services in the prior bankruptcy proceeding which, under Section 77B, it was intended they should have.

Conclusion.

It is respectfully submitted that the construction placed upon Section 77B (i) by the Circuit Court of Appeals to the effect that the power to make reasonable allowances for services of trustees in prior bankruptcy proceedings when superseded by reorganization proceedings under Section 77B, is subject to the limitations found in Section 48, is erroneous; and its decision should be reviewed by this Court.

In view of the importance of this question in reorganization proceedings under Section 77B, it is earnestly hoped that the petition will be granted.

The petition for a Writ of Certiorari should be granted.

Dated: New York City, N. Y., October 22, 1935.

Percival E. Jackson,
Counsel for Petitioners.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 539.

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON and WILLIAM M. GREVE, individually and as trustees in bankruptcy and as trustees in reorganization of ALLIED OWNERS CORPORATION,

Petitioners,

against

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

IN THE MATTER

of

ALLIED OWNERS CORPORATION,

Bankrupt.

IN THE MATTER

of

ALLIED OWNERS CORPORATION,

Debtor.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

PERCIVAL E. JACKSON,
Counsel for Petitioners.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

Preliminary Statement.

This proceeding is before this Court on Writ of Certiorari to the United States Circuit Court of Appeals for

the Second Circuit, to review a decree made on the 29th day of July, 1935, which modified (1) that portion of an order in bankruptcy made by the United States District Court for the Eastern District of New York, entered on March 11, 1935, fixing the compensation of the above named trustees in bankruptcy, (2) that portion of an order in a proceeding under Section 77B of the Bankruptcy Act, made by the District Court, entered on March 11, 1935, directing the payment of the said compensation to the said trustees, and (3) an order of the District Court, entered on May 13, 1935, denying a motion of the Reconstruction Finance Corporation to vacate each of the said orders (R., pp. 307, 311, 386). The decree of the Circuit Court of Appeals modified the orders of the District Court by reducing the compensation of the trustees in bankruptcy from the aggregate amount of $90,000, as fixed by the order of the District Court entered March 11, 1935, to the sum of $14,628.50 for the three trustees, being two per cent. of the sum of $731,425.57 cash turned over by the trustees in bankruptcy (R., pp. 420, 423). On December 9, 1935, this Court granted petitioners' application for a writ of certiorari to review the said decree.

Opinions Below.

The opinions of the District Court are not reported but are printed in the Record (R., pp. 305, 377). The opinion of the Circuit Court of Appeals is reported in 79 F. (2d) 187 (Advance Sheets, November 11, 1935).

Jurisdiction.

The decision of the Circuit Court of Appeals was rendered on July 22, 1935, and the order for the mandate

thereon was entered on July 29, 1935. The mandate was issued on September 18, 1935.

Jurisdiction of this Court rests upon Section 240(a) of the Judicial Code as amended by Act of Congress of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

Question Presented.

Whether Section 48 of the Bankruptcy Act applies to and limits the compensation for services of trustees in a bankruptcy proceeding when that proceeding is superseded by a proceeding under Section 77B.

This question and point was raised by the Reconstruction Finance Corporation, a creditor of the Debtor, before the Circuit Court of Appeals.

Statement of Facts.

On August 8, 1933, Allied Owners Corporation was adjudicated a bankrupt on its voluntary petition (R., p. 141). On August 25, 1933, Stephen Callaghan and Percival E. Jackson became trustees in bankruptcy, and on September 14, 1933, William M. Greve became a trustee (R., p. 6).

On June 22, 1934, the bankruptcy proceedings were superseded by proceedings for reorganization under Section 77B and the former trustees in bankruptcy were appointed trustees in reorganization (R., p. 3).

Subsequently, an application for allowances for services in the bankruptcy proceeding was filed by the trustees with the Referee in Bankruptcy, and the Referee thereupon gave notice to creditors of a hearing to be held upon said application and other applications, including his own application for services in the bankruptcy matters (R., pp. 264-265). At the hearing before the Referee, the Recon-

struction Finance Corporation and other creditors appeared and objected to the proposed allowances as illegal and excessive (R., pp. 287-288).

The Referee thereafter filed his report wherein he recommended allowances to the trustees in bankruptcy in the aggregate sum of $60,000, to be equally apportioned between them (R., p. 300). The Referee in his report expressed the opinion that Section 77B, subdivision (i) gives the Court appointing prior trustees authority to fix a *reasonable* allowance for their services; and that the foregoing amount was a reasonable allowance (R., pp. 293, 303). He stated that if Section 48 of the Bankruptcy Act applied, the maximum commissions for the trustees would be $14,628.50, if based on "cash turned over", or $284,119.92 if based "on money and propery turned over" (R., pp. 299-300).

On March 8, 1935, Judge Inch filed a memorandum increasing the aggregate allowance to the trustees from $60,000 to $90,000, and approving the other allowances recommended by the Referee; and on March 11, 1935, an order was entered accordingly (R., pp. 306, 307); and on the same day an order was made by Judge Inch in the reorganization proceeding directing payment of the allowances (R., p. 311).

Upon application of the Reconstruction Finance Corporation that the said orders (and another order fixing the allowances for services of the Referee) be vacated, a hearing was had before Judge Inch, who filed his opinion on May 8, 1935, denying the application of the Reconstruction Finance Corporation (R., p. 377); and on May 13, 1935, an order was made denying the motion (R., p. 386).

In his opinion upon the denial of the motion, Judge Inch said, of reorganization proceedings under Section 77B:

"The plainly expressed purpose of Congress in affording this new form of relief to distressed debtors is to avoid the liquidation of its property which usually follows a bankruptcy or an equity suit with Receivership, and giving opportunity for a rehabilitation of the debtor. Unusual and broad powers are reposed in the court for the above purpose. * * *

"Suffice it to say that had the estate been liquidated no such controversy as this in regard to fees could have arisen, but because the trustees in bankruptcy, having in mind the hoped for rehabilitation of the debtor, steadfastly devoted their skill and best efforts to what thereafter turned out to be the solid foundation of the present acceptable plan, they have been exposed to the criticism that they can only be allowed fees based on a liquidation.

"This is contrary to the very purpose of 77B which removes the temptation of bankruptcy trustees to reduce to cash the estate and assures them of a reasonable allowance even though they have been prevented from liquidating the estate" (R., pp. 380, 382).

Upon appeal of the Reconstruction Finance Corporation from the orders of March 11, 1935, and the order of May 13, 1935, the Circuit Court of Appeals held (in an opinion by Judge A. N. Hand) that Section 48(a) and (e) applied and fixed the amounts of the fees which the trustees in bankruptcy could receive; and reduced the allowance to the three trustees to the aggregate amount of $14,628.50 (R., pp. 420, 423). In its opinion the Circuit Court of Appeals said:

"While we should allow a substantially larger compensation if we were at liberty to disregard Sec-

tion 48(a) the amount awarded by the District Court was plainly excessive. The services of the trustees only lasted ten months, were in many respects preliminary to a reorganization and were far less burdensome than those of their counsel. If the reorganization succeeds they will be entitled to substantial compensation in the 77B proceeding." (Italics added.)

The question here presented is solely a question of law; it is not one of the reasonableness or unreasonableness of the particular allowances made to the trustees herein—if the petitioners are right in their view of the law, the question of what are reasonable amounts may be determined in the Court below.

Specifications of Error.

The Circuit Court of Appeals erred:

1. In holding that when a bankruptcy proceeding is superseded by a reorganization proceeding under Section 77B, the Court which appointed the trustees in bankruptcy is not authorized to fix an allowance for their services as such trustees in an amount which the Court deems reasonable, unaffected by Section 48 of the Bankruptcy Act.

2. In holding that Section 48 fixes the limits within which the Court appointing the trustees in bankruptcy must act in fixing fees for their services as such trustees, when the bankruptcy proceeding is superseded by a reorganization proceeding under Section 77B.

The petitioners contend that:

(1) Where the property of a corporation in bankruptcy has been taken over by trustees and the bankruptcy pro-

ceeding is subsequently superseded by a proceeding for reorganization under Section 77B, it is the intent of the statute (Section 77B, subdivision (i)) that the trustees should receive *reasonable* compensation for their services in the bankruptcy proceeding to be determined in the first instance by the Court which appointed them. The Court of the prior proceeding is evidently called upon to fix the reasonable compensation for the services rendered therein, in order that the reorganization court may have the benefit of the experience of the prior court in estimating the fair value thereof; but the judge in the reorganization proceeding must also pass upon and determine the reasonableness of the allowances in the light of the additional matters (including the proposed plan of reorganization) before him (*Matter of New York Investors, Inc.*, 79 F. (2d) 179, 181 (C. C. A. 2nd)). This is the rule that has been applied in the case of an equity receivership in a Federal Court which has been superseded by a proceeding under Section 77B (*Matter of New York Investors, Inc., supra*). No different principle applies where a prior bankruptcy proceeding is superseded by a 77B proceeding.

(2) In all cases (whether in the case of equity receiverships in Federal or State courts, or prior bankruptcy proceedings) it is the intent of the statute that the prior receiver or trustee should receive reasonable compensation for his services, fixed first by the Court of his appointment and then checked, as to reasonableness, by the judge in the reorganization proceeding. The Circuit Court of Appeals has, however, announced a rule herein which in many cases would defeat the purpose of the statute that reasonable compensation should be allowed the prior trustee or re-

ceiver, and which would in many instances result in unnecessary hardship and injustice.

(3) It would tend to defeat the purpose of Congress in enacting Section 77B if the rule as to compensation of trustees in prior bankruptcy proceedings were as announced by the Circuit Court of Appeals herein. The evident purpose of the statute is *to avoid liquidation;* yet if trustees in the prior bankruptcy proceeding are to be compensated solely on the basis of commissions upon the amount of money turned over by them, there is a strong incentive to liquidation by transforming the property into money. It was, doubtless, to prevent such a situation that it was provided that the trustees should receive such reasonable compensation as the prior court should fix, to be subsequently checked as to reasonableness by the judge in the reorganization proceeding. Trustees in bankruptcy who, having in view the possible successful rehabilitation of the corporation in a subsequent reorganization proceeding under Section 77B, apply themselves and devote their efforts to conserving, so far as possible, the properties and organization of the bankrupt and to avoiding liquidation, would, in many cases, find their efforts rewarded with altogether inadequate compensation, which might have been many times larger had they vigorously promoted the liquidation of the assets. The decision of the Circuit Court of Appeals sought to be reviewed herein thus tends to defeat the purpose of the new legislation.

(4) Under the decision of the Circuit Court of Appeals herein it would be possible for trustees in bankruptcy to act as such over a considerable period of time and perform services of great value to the corporation, and yet receive

nothing, or substantially nothing, for their services. That no such inequitable result was contemplated by Congress appears from the language of Section 77B, subdivision (i), wherein it is expressly provided that the judge in the reorganization proceeding shall make such orders "as he may deem *equitable*" for the payment of such reasonable allowances in the prior proceeding as may be fixed by the Court appointing the prior trustees. Again, in the same subdivision, it is provided that where a proceeding instituted under Section 77B is dismissed and the debtor's property returned to the prior receiver or trustee, it shall be upon such terms "as the judge may deem equitable," for the protection of obligations incurred by any trustee or trustees appointed in the proceeding and for the payment of allowances therein. The repeating of the word "equitable" in subdivision (i) indicates the intent of Congress that in either case therein provided for the trustees shall receive for their services the reasonable compensation to which they are equitably entitled.

Summary of Argument.

I.

Section 48 of the Bankruptcy Act is not applicable and does not limit the compensation of Trustees in Bankruptcy where the bankruptcy proceeding has been superseded by a proceeding under Section 77B.

Section 48 has no application where the bankruptcy proceeding does not proceed to its normal termination in liquidation or composition, but is summarily cut off and left incomplete by the intervention of a proceeding under Section 77B.

The attempt to apply Section 48 to a bankruptcy proceeding superseded by a proceeding under Section 77B leads unnecessarily to inequitable, unjust and unreasonable results not contemplated by Congress in the enactment of the later statute.

ARGUMENT.

I.

Section 48 of the Bankruptcy Act is not applicable and does not limit the compensation of Trustees in Bankruptcy where the bankruptcy proceeding has been superseded by a proceeding under Section 77B.

The Court below held that, while the allowances to the trustees herein under Section 48 were inadequate, and it would have allowed compensation in a substantially larger sum if it were at liberty to disregard Section 48, yet the limitations fixed by that section prevented the award of any larger amount. It is submitted that in this the Court was in error; and that Section 48 is inapplicable and is not controlling where a prior bankruptcy proceeding is superseded by a reorganization proceeding under Section 77B.

Section 48, subdivision (a), provides that "trustees shall receive for their services, payable after they are rendered, * * * such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed by the courts, not to exceed" the percentages therein set forth. Subdivision (e) provides for larger commissions where the trustees conduct the business. Under the preceding section (Section 47) it is the

duty of trustees to "collect and reduce to money the property of the estates for which they are trustees" and to close up the estates as expeditiously as compatible with the interests of the parties. Upon completion of the liquidation (which is the primary function and purpose of the ordinary bankruptcy proceeding) and the administration of the estate, the trustees are to receive the commissions set forth in Section 48 "on all moneys disbursed or turned over to any person, including lienholders, by them." In case of the confirmation of a composition, Section 48 further provides, the Court may allow the trustee, as compensation, "not to exceed one-half of one percentum of the amount to be paid to the creditors on such composition."

Section 48 says that trustees are to receive for their services, "payable after they are rendered," the compensation therein provided; and there can be no doubt that Section 48 was intended to apply, primarily, to completed administrations. The section, in its original form, and as amended in 1903, specifically provided that trustees were to receive "from estates which they have administered" commissions allowed by the courts. It has been said of Section 48, in its present form, that "no compensation is payable [to trustees] until after the services are rendered, *i. e.*, when the administration is closed" (Collier on Bankruptcy, 13th ed., p. 1074).

Section 48, subdivision (a) contains no provision for commissions to trustees where property is turned over by them *in kind*. In this respect it differs from subdivision (d) of the same section, as to receivers, wherein it is expressly provided that receivers are entitled to commissions on moneys "afterwards realized by the trustees from property turned over in kind by them to the trustees." The

evident reason for this difference is that it is the duty of the trustees to liquidate the estate, convert the properties into money, and to disburse or turn over the moneys; and they are to receive commissions, under Section 48, on the moneys so disbursed or turned over; whereas, in the case of receivers, who are temporarily in possession, it is expected that the property turned over by them to trustees will be largely in kind, as to which a special provision for commissions to receivers is accordingly made in subdivision (d).

Nothing in the provisions of Section 48 as to commissions to trustees, therefore, meets the situation which arises when the bankruptcy proceeding is abruptly cut off and terminated upon the filing and approval of a petition or answer for a corporate reorganization under Section 77B. The latter section provides in subdivision (i) that "if a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court, whether before or after this amendatory act takes effect, a petition or answer may be filed at any time thereafter by the corporation or its creditors as provided in subdivision (a) of this section, and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property."

Thus, if after trustees in bankruptcy have been acting as such for perhaps a considerable period of time, and have become entitled to and taken possession of property of the bankrupt in great amount and value which, however, they have not yet reduced to cash, and while they have substantially no moneys of the bankrupt, a petition or answer for reorganization under Section 77B is filed and ap-

proved, the bankruptcy trustees would be required to turn over the property in kind to the trustees in reorganization, or to the debtor himself if no trustees were appointed; and the bankruptcy trustees would (under the provisions of Section 48) receive substantially no compensation for their services however faithful and valuable to the estate those services may have been.

This situation arises for the reason that while Section 48 provides, as above pointed out, for trustees' commissions in ordinary bankruptcy proceedings (terminating, as they would, in liquidation and distribution, or composition), it was not intended to cover or apply to the new and altogether different proceeding (unknown and unthought of at the time Section 48 was enacted) created by Section 77B.

Section 77B introduced a new element in bankruptcy legislation. Though Section 77B forms part of the Bankruptcy Act, the proceeding for corporate reorganization therein provided for is not, strictly speaking, a bankruptcy proceeding. Through this section (as well, also, as Sections 74, 75, 77 and 80) the Bankruptcy Act is designed to be used as a vehicle for the "*relief of debtors*" (Section 77A), as distinguished from the "liquidation of estates," which was the primary function and purpose of the earlier strict bankruptcy provisions, of which Section 48 forms a part. A clearly drawn distinction exists between those who are adjudicated bankrupts in the ordinary bankruptcy proceedings and debtors who seek relief in proceedings under Section 77B; the section itself, in subdivision (a), specifically provides that the corporation for whose relief the proceeding is brought shall be referred to therein as a "debtor" and not as a "bankrupt".

As was said by Judge Inch in his opinion herein, "the plainly expressed purpose of Congress in affording this new form of relief to distressed debtors, is *to avoid the liquidation* of its property which usually follows a bankruptcy or an equity suit with receivership and give opportunity for a rehabilitation of the debtor" (R., p. 380). In *Campbell* v. *Alleghany Corp.*, 75 Fed. (2d) 947, 951 (C. C. A. 4th Ct.), it is said of Section 77B: "Only by the further exercise of the bankruptcy power of Congress could adequate relief be afforded to these distressed debtor corporations and their creditors; and the act in question was passed for the purpose of affording this relief."

Because there was no provision in the previously enacted sections of the Bankruptcy Act (having to do with ordinary bankruptcy proceedings) for the compensation of the trustees in bankruptcy, who are required by this new Section 77B to turn over the property (perhaps for the most part in kind) to the trustees in the reorganization proceeding, a provision for such compensation is found in a further provision of subdivision (i) of Section 77B, as follows: "and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee."

If it were not for this provision of Section 77B, the sole power to fix the allowances of receivers or trustees appointed in prior proceedings would apparently be in the judge in the reorganization proceeding, the entire property of the debtor corporation having come under his supervision and control (*Gross* v. *Irving Trust Co.*, 289 U. S.

342). The clearly stated purpose of Section 77B, however, is to have the court in the prior proceeding (being more familiar with the services therein rendered) fix allowances, in such amounts as the court deems reasonable, for the receiver or trustees appointed therein. It is then for the judge in the reorganization proceeding to make such orders "as he may deem equitable" for the payment of such "reasonable" allowances as have been fixed by the court appointing the receiver or prior trustees.

Therefore, in the case of prior trustees in bankruptcy, the prior bankruptcy court is first to determine the reasonable amounts to be allowed for their services; but the amounts so allowed must also be reviewed, as to their reasonableness, by the judge before whom the reorganization proceeding is pending, in the light of the new matters, including the plan of reorganization, pending before him. Thus, the amounts fixed by the bankruptcy court as reasonable in view of the services performed might be found by the judge in the reorganization proceeding to be such that their payment would endanger the success of the plan of reorganization; and he might, therefore, make such an order as he deemed equitable for the payment of amounts found by him to be reasonable.

A correct statement of the rule as to allowances under Section 77B(i) to receivers and trustees in prior proceedings is that suggested in *In re 211 East Delaware Place Bldg. Corp.*, 7 F. Supp. 892, 896 (D. C., Ill.), wherein it is said:

> "It seems to have been intended by Congress that prior receivers and other parties having claims for compensation for administrative services should present their application for fixing such reasonable

> compensation to the court under whose jurisdiction they were appointed. The proper procedure apparently is for that court to enter an order adjudicating such claims, said action to be followed by the action of the bankruptcy [77B] court in directing the payment of such of the same as shall be found to be reasonable."

This was the view taken by the Court below, of the procedure to be followed under Section 77B(i), in *Matter of New York Investors, Inc.*, 79 F. (2d) 179, 181 (C. C. A. 2nd), wherein (an equity receivership in a Federal court having been superseded by a reorganization proceeding) it was said: "These provisions [subdivision (i)] were inserted in the act to give the reorganization court the benefit of the experience of the prior court in estimating the fair value of the services."

Though the Court below has adopted the view above expressed in the case of equity receiverships superseded by reorganization proceedings, it has, in the present case, as to a prior bankruptcy proceeding superseded by a reorganization proceeding, placed a different construction on Section 77B(i), which has resulted (as the Court below said) in inadequate compensation to the trustees herein, and which, in other cases, might readily give to trustees in bankruptcy no compensation whatever. The Court adopted this construction because, as it said, it felt constrained to do so by the limitations found in Section 48 of the Bankruptcy Act. The Court below was in error in this respect for the reason, as above pointed out, that there is nothing in Section 48 that applies to or covers the situation created (under the subsequently enacted legislation) where a bankruptcy proceeding is abruptly interrupted and summarily ended by a subsequent reorganization proceeding.

It is not the contention of the petitioners herein, as the Court below seemed to think, that Section 77B(i) does away with or in any way affects the restrictions or limitations found in Section 48. That section now limits, as before, the allowances in the ordinary or strict bankruptcy proceedings, unaffected by anything in Section 77B(i); while the latter section provides for *reasonable allowances* to be made in the prior proceedings in cases within the new legislation, to which Section 48 should be held to be inapplicable. The two sections are not inconsistent; each applies to and is controlling in its own field.

The limited construction placed upon Section 77B(i) by the Court below defeats the evident purpose of Congress that *in all cases* (not merely in equity receiverships in Federal or State courts and in a limited number of prior bankruptcy proceedings) the receiver or trustees appointed in prior proceedings should have *reasonable compensation* —reasonable (1) with respect to the services rendered, and (2) with respect to their effect upon the reorganization—and therefore to be passed upon by the judges in both proceedings. The limited construction adopted below leads to inequitable, unjust and unreasonable results. That it was the purpose of Congress that *equitable* provision should be made for the payment of *reasonable compensation* appears from the emphasis placed upon the word "equitable" in subdivision (i) wherein it appears twice in connection with the making of reasonable payments.

A statute should receive a reasonable construction, so as to give effect to the object of the legislature, and if the meaning is doubtful such a construction, if possible, as will not lead to unreasonable results (*People ex rel. Hallock* v. *Hennessy*, 205 N. Y. 301). In construing the provisions

of the Bankruptcy Act this Court has said, "We should therefore construe the language of the Act so as to effectuate the evident purpose of the legislation, and not so narrowly as to defeat the true intent of Congress" (*Royal Indemnity Co.* v. *American Bond & Mtge. Co.*, 289 U. S. 165, 169).

When a prior bankruptcy proceeding has been superseded by a reorganization proceeding under Section 77B, the prior proceeding has abruptly terminated. Nothing remains therein except to fix the reasonable allowances. Where the trustees in bankruptcy have worked hard and faithfully having in mind the possibility of the successful rehabilitation of the debtor corporation, and to that end have devoted their efforts to conserving the corporate property and organization (and not to liquidating the assets, with a view to increasing their commissions), they may have on hand, when the bankruptcy proceeding is interrupted, substantially no cash; and in such case they would receive substantially no compensation for their services, however, extended, arduous and faithful they may have been. Such a result, which puts a premium on liquidation, was never contemplated when Section 77B was enacted. The view adopted by the Court below further operates to defeat the purpose of Congress in that it would make it increasingly difficult to procure men of ability and high standing to act as bankruptcy trustees if there were no assurance that they would receive reasonable compensation for their services in the bankruptcy proceedings.

The Court below says in its opinion that it was never intended that the determination of the prior court upon allowances should be conclusive upon the judge in the reorganization proceeding (R., p. 418). This is in accord

with the position of the petitioners herein—the prior court is to fix such allowances for the services as it deems reasonable, and the judge in the reorganization proceeding must review them, in the light of the additional matters before him (including the proposed plan of reorganization), and make an "equitable" order for the payment of "reasonable" allowances.

The Court below suggests that if the parties whose compensation is fixed by the prior court feel aggrieved by the allowances as inadequate, "they would seem to have an obvious remedy by appeal" (R., p. 418). But if the construction placed upon the statute by the Court below is correct, and if the trustees in the prior proceeding (who have rendered extended and valuable services) are allowed only nominal compensation, or no compensation at all, because there is substantially no cash (by reason of the limitations contained in Section 48 which the Court below has held applicable) then an appeal would be futile; because the appellate court would be subject to the same *statutory limitations,* and could make no additional allowance.

Under the construction of the statutes urged by the petitioners herein, the function of appeals in such proceedings, and the relief that may be had on appeal, become apparent. Thus, if the prior court should fix the "reasonable allowance" under Section 77B(i) in an amount which the trustees or receiver deem unreasonably low, they may have the order reviewed upon appeal therefrom, and the amount increased by the appellate court if that court believes the amount fixed to be inadequate. If no appeal is taken from the order of the prior court, the judge in the reorganization proceeding will also pass upon the reasonableness of the allowances, and may reduce the amounts if

he deems them too large, in view of the additional matters before him; but he cannot increase the amounts, for the reason that the fixing of the allowances is by Section 77B(i) charged upon the prior court. *Matter of New York Investors, Inc., supra.* If the judge in the reorganization proceeding should decrease the allowances to amounts unreasonably low, his action in this respect could be reviewed upon appeal. But it is obvious that if the allowances fixed by the prior court are inadequate solely because the strict limitations contained in Section 48 are held to apply (as the Court below held in the present case) then the appellate court could not award any greater amounts since its action would be controlled by the same limitations.

It is also suggested by the Court below in the present case that, although the allowance made to the trustees is admittedly inadequate, yet as they are also the trustees in the reorganization proceeding, where they will be entitled to substantial compensation, the failure to allow them reasonable and adequate compensation for their services as prior bankruptcy trustees, may in this way in some measure be made up to them (R., p. 420). But it was evidently not the purpose of Congress that the failure to allow trustees reasonable compensation in one proceeding, should be made up to them by proportionately increasing the allowances in, and the burden thus imposed upon, another proceeding. Each proceeding must stand by itself. Moreover, the trustees in the reorganization proceeding may be different persons from the trustees in the prior proceeding; or no trustee at all may be appointed in the reorganization proceeding, in which case the statute requires the property to be turned over to the debtor itself.

Congress had before it, as a new and radical departure, the requirement that the prior trustee must, upon the ap-

proval of a petition under 77B, turn all the property over to a paramount title; and with this so distinctly before it, it is unreasonable to suppose that it did not have in mind compensating the prior trustee. It is obvious from a reading of Section 77B that what Congress was concerned with doing, and what it actually accomplished, was *the substituting of a reasonable allowance for a statutory allowance.*

It is said, in the opinion below, that it was the purpose of Congress to lessen the cost of insolvency proceedings which had long been regarded as too great; and this is undoubtedly so. This is, however, accomplished by the construction placed upon 77B, subdivision (i) by the petitioners herein. The statute affords a double check upon the reasonableness of the allowances,—the prior court is first to fix them in such amounts as it deems reasonable, and the judge in the reorganization proceeding is also to pass upon and determine that they are reasonable. These determinations may be further reviewed upon appeal, and modified if the appellate court believes them unreasonably large (*Matter of New York Investors, Inc., supra*). Thus the construction of the statute, for which petitioners contend, facilitates rather than impedes the economical administration of the debtor's estate and the successful reorganization of the debtor corporation.

The fact should not be lost sight of that it is not now a question of the amounts of the particular allowances in the present case. If they are deemed too large they may be modified by the Court below to such amounts as it may deem reasonable. The question is solely one of law, as to whether the Courts are prevented from allowing reasonable compensation for the services of prior bankruptcy trustees by reason of limitations found in Section 48, which the petitioners believe to be inapplicable.

That Section 48 does not apply to or limit the reasonable allowances to trustees in "proceedings *instituted*" under Section 77B, is expressly provided in subdivision (k) thereof, which provides that where in a proceeding instituted under Section 77B an order for liquidation is made, Section 48 applies, but as to all other proceedings under Section 77B *not terminating in liquidation*, Section 48 has no application. The express provision of subdivision (k) that Section 48 applies only in said proceedings terminating in liquidation, gives additional support to the view of the petitioners herein that the limitation of trustees' commissions found in Section 48 applies and was intended to apply *only where there is a liquidation.*

It may be said, moreover (and this point was also raised by petitioners in the Court below) that Section 77B, subdivision (k), in providing that "none of the sections enumerated in this subdivision (k) [including Section 48] shall apply to proceedings instituted under this Section 77B unless and until an order has been entered directing the trustee or trustees to liquidate the estate", was intended to include and to incorporate into the reorganization proceeding under Section 77B the prior proceeding (in which a receiver or trustees had been appointed and which had been superseded by the 77B proceeding) to the extent of excluding the operation of Section 48 therefrom; so that the sole provision of the Bankruptcy Act for the compensation of trustees in a prior bankruptcy proceeding superseded by a proceeding under Section 77B should be that provided in subdivision (i) thereof, above quoted, namely, such reasonable allowance as the court of prior appointment should fix, subsequently approved by the judge in the reorganization proceeding. This construction of subdivision (k) (which

was not adopted by the Court below) would give effect to what petitioners believe was its real purpose, that is, to afford to receivers and trustees in all prior proceedings, of whatever nature, whether in Federal or State courts, when superseded by proceedings under Section 77B, reasonable compensation for their services in such prior proceedings.

The decision of the Court below has deprived the petitioners of the reasonable compensation for their services in the prior bankruptcy proceeding which, under Section 77B, it was intended they should have.

Conclusion.

It is respectfully submitted that the construction placed upon Section 77B (i) by the Circuit Court of Appeals to the effect that the power to make reasonable allowances for services of trustees in prior bankruptcy proceedings when superseded by reorganization proceedings under Section 77B, is subject to the limitations found in Section 48, is erroneous; and that the said decree of the Circuit Court of Appeals should be reversed, in so far as it affects the allowances made to the petitioners herein, and the orders of the District Court affirmed.

PERCIVAL E. JACKSON,
Counsel for Petitioners.

PERCIVAL E. JACKSON,
RALPH STOUT,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 539.

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON and WILLIAM M. GREVE, individually and as trustees in bankruptcy and as trustees in reorganization of ALLIED OWNERS CORPORATION,

Petitioners,

against

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONERS' REPLY MEMORANDUM.

Point II of the respondent's brief is devoted largely to a discussion of facts bearing upon the question of the reasonableness of the amounts awarded to petitioners by the District Court and by the Circuit Court of Appeals.

It is submitted that the only question upon this appeal is one of law, namely, the construction of Section 77B of the Bankruptcy Act in its relation to Section 48 of the Act. That was the only question considered in the petitioners'

brief herein. It was assumed by the petitioners that if this Court should determine that the construction of the statute adopted by the Circuit Court of Appeals was erroneous, it would remit the proceeding to the Court below for determination of the amounts to be awarded.

It is, therefore, submitted that Point II of respondent's brief should be disregarded. If, however, this Court should decide that the Court below erred in its construction of the statute, and should also undertake to determine the reasonableness of the allowances to be made, the petitioners respectfully request that they be given an opportunity to submit a supplemental brief, solely upon the question of the reasonableness of the amounts to be allowed, in view of the services rendered, at such time as the Court may fix.

In Point II of the respondent's brief (on page 23), it is said that "the petitioners have sought to convey the impression that the construction of the Bankruptcy Act urged by the respondent has resulted in a grossly inadequate award". Such is the petitioners' belief. Their belief finds support, in part at least, in the opinion of the Court below wherein it is said that "we should allow a substantially larger compensation if we were at liberty to disregard Section 48 (a)."

In Point II of its brief, the respondent, in an effort to minimize the value to be placed upon the trustees' services in the prior bankruptcy proceeding, has set forth (particularly in the footnote on pages 23 and 24) matters not in the record purporting to be facts as to other activities and compensation in other matters of one or more of the trustees; and included therein are matters purporting to have been brought out upon hearings before the so-called Sabath Committee, as reported in the metropolitan newspapers. It

is submitted that such matters, not appearing in the record herein, should be wholly disregarded. This is true, also, of the references to matters in the public press (found in the footnote on page 32 of respondent's brief) apparently inserted to create an atmosphere unfavorable to petitioners.

On page 25 of respondent's brief (under Point II) it is said that much of the petitioners' application for compensation herein "relates to matters that were not completed until after the termination of the bankruptcy proceeding"; and that the petitioners, who are also the trustees in the proceeding under Section 77B, will be compensated in that proceeding. The prior bankruptcy proceeding and the proceeding under Section 77B are, however, distinct proceedings; and the statute prescribes that the prior bankruptcy court shall fix the reasonable allowances for services rendered by trustees in the prior proceeding. The trustees may, therefore, be properly compensated in the 77B proceeding only for services rendered by them in that proceeding. If they asked for more therein (including compensation for services in a prior independent proceeding), they would undoubtedly be met with the valid objection that they could then be compensated only for services rendered in the 77B proceeding.

On pages 29 and 30 of respondent's brief (and also in Point I, subdivision B), it is said, in substance, that the construction of the statute contended for by the petitioners would tend to defeat the purpose of Congress to check excessive fees in bankruptcy proceedings. Instead of tending to defeat such purpose, the construction here contended for is in aid and furtherance thereof. Under this construction, there is a double check upon the reasonableness of the allowances to prior trustees, first, in the prior proceeding

(where the determination of the Court may be reviewed upon appeal); and, secondly, in the proceeding under Section 77B, where the judge must also pass upon the reasonableness of the allowances, in the light of the pending reorganization, and his determination may likewise be reviewed upon appeal.

Respectfully submitted,

PERCIVAL E. JACKSON,
Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 539

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON, AND WILLIAM M. GREVE, individually and as trustees in bankruptcy and as trustees in reorganization of Allied Owners Corporation, Petitioners

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 377–385) is not reported. The opinion of the Circuit Court of Appeals (R. 416–423) is reported in 79 F. (2d) 187.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 1, 1935 (R. 423). The petition

for a writ of certiorari was filed October 24, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of Congress of February 13, 1925.

QUESTION PRESENTED

Whether Section 48 of the National Bankruptcy Act fixes the maximum measure of compensation to trustees for their services in a bankruptcy proceeding when that proceeding has been superseded by a Section 77B reorganization proceeding.

STATUTES INVOLVED

The applicable statutes are set forth in the Appendix, *infra*, pp. 9–13.

STATEMENT

On August 8, 1933, Allied Owners Corporation was adjudicated a bankrupt on its voluntary petition (R. 141). Respondent is pledgee of all the stock of the corporation, and is the principal unsecured creditor. On August 25, 1933, petitioners Callaghan and Jackson became trustees in bankruptcy, and, on September 14, 1933, petitioner Greve became the third trustee in bankruptcy (R. 2). On June 22, 1934, the bankruptcy proceeding was superseded by a Section 77B proceeding, at which time petitioners became trustees in reorganization (R. 3).

On or about January 28, 1935, applications for allowances for services performed in the bank-

ruptcy proceedings were filed with the referee in bankruptcy by petitioners, as trustees in bankruptcy (R. 6–136), and by others. After due notice and hearing, at which respondent and other creditors appeared in opposition, the referee, on March 2, 1935, filed his report, recommending allowances that included an allowance of $60,000 to petitioners for services performed as trustees in bankruptcy. (R. 287, 300.)

On March 8, 1935, the District Judge filed his memorandum increasing, without further hearing, the allowances to petitioners to $90,000 and approving the other allowances (R. 305–306). On March 11, 1935, orders were entered by the District Judge, in accordance with his memorandum opinion, and a further order was entered at the same time in the reorganization proceeding directing the trustees in reorganization to make the payments (R. 307–313).

Respondent moved to have the allowances reduced. The District Court filed its opinion overruling the motions (R. 377), and, on May 13, 1935, entered an order accordingly (R. 386).

On appeal by respondent from the orders of March 11, 1935, and May 13, 1935, the Circuit Court of Appeals ruled that Section 48 of the Bankruptcy Act fixed the maximum compensation for trustees in bankruptcy proceedings and accordingly reduced the allowances to petitioners from $90,000 to $14,628.50 (R. 420–423).

ARGUMENT

1. The court below held that Section 48 of the Bankruptcy Act fixes the maximum measure of compensation to trustees for their services in the bankruptcy proceeding, when that proceeding has been superseded by a reorganization proceeding under Section 77B. Petitioners here contend that Section 48 is inapplicable, and rely on subdivisions (i) and (k) of Section 77B.

There is no reason to deny to Section 48 its plain meaning. That section provides in part:

> Trustees shall receive for their services, payable after they are rendered, * * * such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed by the courts, not to exceed [certain percentages] * * *.

Subdivision (i) of Section 77B provides in part:

> If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, * * * a petition or answer may be filed under this section * * * and the judge shall make such orders as he may deem equitable * * * for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said * * * prior trustee.

This subdivision expressly requires the prior court to fix the allowances. The prior bankruptcy

court was bound by the provisions of Section 48. Section 77B (i) does not remove this restriction on the prior court. The word "reasonable" gives the reorganization court the power to revise prior allowances, whether made in an equity receivership or in bankruptcy. Subdivision (i), therefore, authorizes the reorganization court merely to make "equitable orders" for the payment of prior allowances, in the words of the court below, "to the extent that they are found reasonable."

There is nothing in subdivision (k) of Section 77B which offers support to petitioners. It provides merely that:

> None of the sections enumerated in this subdivision (k) [including Section 48] * * * shall apply to proceedings instituted under this section 77B unless and until an order has been entered directing the trustee or trustees to liquidate the estate. * * *

This subdivision, as pointed out by the court below, refers only to proceedings instituted under Section 77B and does not render Section 48 inapplicable to *prior* proceedings which are instituted and conducted under the bankruptcy sections.

This Court has recently had occasion to stress the independence from one another of bankruptcy proceedings and those under the recently enacted provisions for the relief of debtors. *Realty Corp.* v. *O'Connor,* 295 U. S. 295, 301.

2. It is universally recognized, and petitioners admit, that excessive fees to those entrusted with

the administration of insolvents' estates was one of the evils that Congress sought to eliminate by the enactment of Section 77B. See Senate Report No. 482, 73d Cong., 2d Sess., pp. 3, 4, 7, 9; c. 424, Sec. 3, 48 Stat. 923 (the Act which contains Section 77B); Sec. 72 of the Bankruptcy Act, 11 U. S. C. (1934 ed.), sec. 112; *Realty Corp.* v. *O'Connor*, 295 U. S. 295, 299. This Court, in *Realty Corp.* v. *O'Connor, supra,* has declared (pp. 299–300) that "a court will not forget that Congress meant to hit the evil of extravagance, and that the meaning of its words, if doubtful, must be adapted to its aim." Congress, concerned with excessive and exorbitant fees, cannot have intended by mere inference to disturb existing restrictions upon allowances.

Petitioners contend that the decision below will be an incentive to trustees to liquidate in order to procure maximum fees, rather than to look toward the reorganization of insolvents' estates. It would seem rather, if trustees may be considered to be so motivated, that this decision should tend to hasten transfers to proceedings under Section 77B, and thus to give effect to the purpose of Congress to have economical and speedy reorganization of insolvents' estates. Cf. *Realty Corp.* v. *O'Connor, supra,* p. 299; *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 685.

3. The same conclusion has been reached by a District Court. *In re Paramount Publix Corp.* (S. D. N. Y., December 10, 1934, unreported, cited in the opinion below).

Petitioners do not contend that there is a conflict of decisions, but imply that the decision below is inconsistent with a decision of the same court rendered in *In re New York Investors, Inc.*, 79 F. (2d) 182. The *Investors* case involved the applicability of Section 77B to allowances fixed by the equity receivership court that preceded the reorganization court. The court there referred to the fixing of "reasonable" fees by the equity court but only because the equity court was subject to no statutory restrictions, and not because Section 77B provided the equity court with independent power to fix the allowances.

In *In re 211 E. Delaware Building Corp., Inc.*, 7 F. Supp. 892 (E. D. Ill.), the court, in dealing with allowances made in a prior equity receivership, had adopted substantially the same line of reasoning as that in the *New York Investors* case.

4. None of the issues here presented will arise unless Section 77B reorganization proceedings are preceded by other Federal or State insolvency proceedings. When the present transitional period is passed, it is believed that only isolated reorganization proceedings will be preceded by other insolvency proceedings.

CONCLUSION

The decision of the court below is correct and is in accord with the principles announced by this Court in *Realty Corp.* v. *O'Connor, supra.* There is no conflict of decisions. The question presented

is not one of general or continuing importance. It is therefore respectfully submitted that the petition should be denied.

STANLEY REED,
Solicitor General.

MAX O'RELL TRUITT,
Solicitor Reconstruction Finance Corporation.

Of Counsel:

JAMES B. ALLEY,
General Counsel
Reconstruction Finance Corporation.

ELI WHITNEY DEBEVOISE.

NOVEMBER 1935.

APPENDIX

NATIONAL BANKRUPTCY ACT AS AMENDED

SEC. 48. (a) [11 U. S. C. (1934 ed.), Sec. 76.] Trustees shall receive for their services, payable after they are rendered, * * * such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed by the courts, not to exceed 6 per centum on the first $500 or less, 4 per centum on moneys in excess of $500 and less than $1,500, 2 per centum on moneys in excess of $1,500 and less than $10,000, and 1 per centum on moneys in excess of $10,000. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of 1 per centum of the amount to be paid the creditors on such composition.

(b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

* * * * *

(e) Where the business is conducted by trustees, * * * as provided in clause 5 of section 11, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person,

including lienholders, by them, * * *; such commissions not to exceed 6 per centum on the first $500 or less, 4 per centum on moneys in excess of $500 and less than $1,500, 2 per centum on moneys in excess of $1,500 and less than $10,000, and 1 per centum on moneys in excess of $10,000. In case of the confirmation of a composition such commissions shall not exceed one-half of 1 per centum of the amount to be paid creditors on such composition. Before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section 94.

SEC. 72. [11 U. S. C. (1934 ed.), Sec. 112.] Neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this title.

SECTION 77B.—

(i) [11 U. S. C. (1934 ed.), Sec. 207 (i).] If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, whether before or after June 7, 1934, at 12 o'clock noon, a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the pro-

tection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee. If a receiver or trustee has been appointed by a Federal or State or Territorial court prior to the institution of a proceeding under this section, and such proceeding shall be dismissed under subdivision (c), clause (8), of this section, the judge may include in the order of dismissal appropriate orders directing the trustee or trustees, or the debtor if no trustee is appointed, to transfer possession of the debtor's property within the territorial jurisdiction of such court to the receiver or prior trustee so appointed, upon such terms as the judge may deem equitable for the protection of obligations incurred by any trustee or trustees appointed under this section, and for the payment of administrative expenses and allowances in the proceeding hereunder. For the purposes of this section the words "Federal court" shall include the district courts of the United States and of the Territories and possessions to which this section and section 206 of this title are or may hereafter be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska, and the District Court of the United States for the Territory of Hawaii.

(k) [11 U. S. C. (1934 ed.), Sec. 207 (k).] If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section: (1) The case may be referred to a referee as provided in section 45 of this title, who shall be compensated

as provided in section 68 of this title; (2) the first meeting of creditors shall be held as provided in section 91 of this title, upon notice as provided in section 94 of this title; (3) a trustee or trustees shall be appointed as provided in section 72 of this title, and be compensated as provided in section 76 of this title; (4) claims which are provable under section 103 of this title may be proved as provided in section 93 of this title, except that the time within which proof may be made shall not expire until six months after the date of the last publication of the notice of the first meeting; (5) debts shall be entitled to priority as provided in section 104 of this title; (6) sales shall be made as provided in subdivision (b) of section 110 of this title; (7) dividends may be declared and paid as provided in section 105 of this title. None of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j), and (m) of section 93 of this title, and subdivisions (a) and (e) of section 110 of this title, shall apply to proceedings instituted under this section unless and until an order has been entered directing the trustee or trustees to liquidate the estate. All other provisions of this title, except such as are inconsistent with the provisions of this section, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors"; "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the

same consequences and effect as an order of adjudication.

SEC. 3 OF THE ACT OF CONGRESS OF JUNE 7, 1934, C. 424, 48 STAT. 923 (11 U. S. C. (1934 ED.), SEC. 76A)—

> * * * The compensation allowed a receiver or trustee or an attorney for a receiver or trustee shall in no case be excessive or exorbitant, and the court in fixing such compensation shall have in mind the conservation and preservation of the estate of the bankrupt and the interests of the creditors therein.

U. S. GOVERNMENT PRINTING OFFICE: 1935

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Supreme Court
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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 539

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON and WILLIAM M. GREVE, individually and as trustees in bankruptcy and as trustees in reorganization of ALLIED OWNERS CORPORATION,

Petitioners,

against

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RECONSTRUCTION FINANCE CORPORATION, RESPONDENT.

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IN THE

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OCTOBER TERM, 1935.

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STEPHEN CALLAGHAN, PERCIVAL E. JACKSON and WILLIAM M. GREVE, individually and as trustees in bankruptcy and as trustees in reorganization of ALLIED OWNERS CORPORATION,

Petitioners,

against

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

Introductory.

This case relates to an allowance of compensation to the petitioners for services rendered as bankruptcy trustees in

a bankruptcy proceeding which was superseded by a reorganization proceeding under Section 77B of the Bankruptcy Act.*

The District Court for the Eastern District of New York entered two orders (R. 217-219, 220-221), one allowing the petitioners as trustees in the bankruptcy proceeding the amount of $90,000 for services rendered in that proceeding during a ten-month period, and the other directing the petitioners, as trustees appointed in the reorganization proceeding, to pay themselves that amount. An application by respondent Reconstruction Finance Corporation to vacate and set aside the orders and to revise the allowance to the petitioners (as well as certain other allowances) was denied by the District Court in a third order (R. 270-271).

On appeal by the respondent from all three orders, the Circuit Court of Appeals modified the orders of the District Court by reducing the allowance to the petitioners for their services in the bankruptcy proceeding as bankruptcy trustees from $90,000 to $14,628.50,† the maximum compensation permitted by Section 48 of the Bankruptcy Act, which the Circuit Court held to be applicable. The Circuit Court stated that irrespective of Section 48 (a) "the amount awarded by the District Court was plainly excessive" (R. 292).

On December 9, 1935, this Court granted a writ of certiorari.

Opinions Below.

The opinions of the District Court are not reported but are printed in the Record (R. 216-217, 263-269). The opinion of the Circuit Court of Appeals is reported in 79 F. (2d) 187 and appears at R. 287-295.

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* A companion case, *Stitt* v. *Reconstruction Finance Corporation*, No. 540, involves the compensation of the Referee for his services in the same bankruptcy proceeding.

† No moneys whatsoever have been paid to creditors in either proceeding. The award of $14,628.50 was computed as 2% of $731,425.57 cash "turned over", of which a portion was disbursed by the petitioners in the conduct of the business during the bankruptcy and the major portion turned over on the termination of the bankruptcy proceeding by the petitioners to themselves as trustees appointed in the Section 77B proceeding.

Jurisdiction.

The opinion of the Circuit Court of Appeals was rendered on July 22, 1935, the order for the mandate thereon was entered on July 29, 1935, and the mandate was filed on September 18, 1935.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended (U. S. C. Title 28, Sec. 347a).

Statement of the Case.

On August 8, 1933, Allied Owners Corporation was adjudicated a bankrupt upon its voluntary petition (R. 102).

On August 25, 1933, petitioners Stephen Callaghan and Percival E. Jackson became trustees in bankruptcy (R. 4). On September 14, 1933, petitioner William M. Greve became a trustee in bankruptcy (R. 103). The delay in the qualification of Mr. Greve was due to his rejection by the Referee because of an alleged disqualification, such rejection being reversed by the District Court (R. 2, 103, 147).

On June 22, 1934, less than ten months after such appointments*, the bankruptcy proceeding was superseded by a proceeding for reorganization under Section 77B of the Bankruptcy Act, and the former trustees in bankruptcy were appointed trustees in the reorganization proceeding (R. 103).

On January 29, 1935, more than seven months after the termination of the bankruptcy proceeding, the petitioners as bankruptcy trustees filed an application for allowances aggregating $142,059.96 for services in the bankruptcy proceeding (R. 4-102). In their application, the petitioners stated (R. 98), "We are advised and verily believe that we are entitled to receive, under the provisions of the Bankruptcy Act, * * *,

* During their term of less than ten months as bankruptcy trustees, not one of the petitioners devoted anything approaching all of his time to this bankruptcy. Messrs. Callaghan and Jackson actively engaged in the general practice of the law, and Mr. Greve engaged in many diverse business activities not related to the bankrupt (R. 248-249, 252).

and in view of our continuation in business, a maximum of two per cent upon the amount which passed through our hands." This "maximum" was based by the petitioners upon the assumption that Section 48 of the Bankruptcy Act was applicable.* Their petition for certiorari is now based entirely on the argument that Section 48 is not applicable.

On February 4, 1935, the Referee in Bankruptcy gave notice to creditors of a hearing to be held on the trustees' application and other applications for allowances for bankruptcy services (R. 187-188).

At the hearing before the Referee virtually all the creditors represented at the hearing (including the respondent and *all* other substantial creditors) objected to the allowance applied for by the petitioners as illegal and excessive.

On March 5, 1935, the Referee filed his report (R. 203-216) in the bankruptcy proceeding recommending a final allowance to the three petitioners of $60,000 for their services as trustees in the bankruptcy proceeding to be equally apportioned among them. In his report the Referee stated that if Section 48 of the Bankruptcy Act applied, the maximum commissions for the bankruptcy trustees would be $14,628.50 if based on "cash turned over", or $284,119.92 if based on "money and property turned over" (R. 212-213).†

On March 8, 1935, Judge Inch filed a memorandum (R. 216-217) increasing the aggregate allowance to the petitioners as bankruptcy trustees from $60,000 to $90,000 (an increase of 50%) *without any further hearing of any kind.*

On March 11, 1935, Judge Inch entered an order (R. 217-219) fixing the petitioners' allowance as bankruptcy trustees in accordance with the memorandum, and another order

---

* In then admitting the applicability of Section 48, the petitioners contended that commissions could be computed upon property turned over as well as cash, although Section 48 refers specifically to "moneys". (R. 98, 209). The Circuit Court of Appeals dismissed this contention (R. 291-292) and petitioners are not now urging it (Petitioners' Brief, p. 11).

† For some reason which is not clear, the Referee divided each of these two amounts in half, making allowable "one-half for bankruptcy services."

(R. 220-221) in the reorganization proceeding directing the payment of such allowance.

On March 20, 1935, on the petition of the respondent (R. 225-233), Judge Inch signed an order (R. 222-224) directing the bankruptcy trustees (and others to whose allowances objections were taken) to show cause why the orders of March 11, 1935 should not be vacated and set aside and the allowances reduced to legal and reasonable amounts. After a hearing, Judge Inch filed an opinion (R. 263-269) deciding against the respondent. On May 13, 1935, he entered an order (R. 270-271) denying its motion.

On appeal of the respondent from the orders of March 11, 1935 and the order of May 13, 1935, the Circuit Court of Appeals held, in an opinion (R. 287-295) by Judge Augustus N. Hand, that Section 48 (a) and (e) are applicable to and limit compensation of bankruptcy trustees for services in a bankruptcy proceeding and that a supervening proceeding under Section 77B does not remove such limitations. The court accordingly reduced the allowance to the bankruptcy trustees to the aggregate amount of $14,628.50 (R. 289, 292), being the *maximum* statutory commission permitted on the moneys disbursed or turned over by the bankruptcy trustees. In its opinion the Circuit Court of Appeals said (R. 289ff.):

> "If Section 48 (a) and (e) had been applied, the trustees in bankruptcy would have been limited to the statutory fees on $731,425.57 cash turned over by them, or $14,628.50. But it is argued that their compensation was subject to no such limitations and that the language of 77B (i) leaves the amount of compensation for services in the prior bankruptcy proceeding to the discretion of the judge in the reorganization proceeding guided only by the 'rule of reason'. In our opinion, however, Section 48 (a) fixes the bounds of the fees which the trustees in bankruptcy can claim.
>
> * * * Under 77B (j) the reorganization court is given power to pay allowances which have been fixed by the prior court only to the extent that they are found reasonable. Nothing in the language of the sub-

division suggests the removal of any restriction which may exist upon the prior court in the determination of allowances. Indeed it is impossible to imagine that court awarding compensation in excess of limitations imposed by a statute to which its orders are made subject. It seems equally unlikely that the reorganization court should be empowered by mere implication to make allowances for services by the agencies of another court which the statutes governing the action of that court forbid.

* * * While we should allow a substantially larger compensation if we were at liberty to disregard Section 48 (a) *the amount awarded by the District Court was plainly excessive.* The services of the trustees only lasted ten months, were in many respects preliminary to a reorganization and *were far less burdensome than those of their counsel.*" (Italics ours.)

That court awarded $50,000 to the petitioners' counsel for their services in the bankruptcy proceeding (R. 293) and no review of that award has been sought by such counsel.

The petitioners herein are not only bankruptcy trustees in the bankruptcy proceeding but also reorganization trustees in the reorganization proceeding and will make application for allowances in their latter capacity in that proceeding* (R. 292).

Question Presented.

Whether bankruptcy trustees may be allowed compensation in excess of the maximum permitted by Section 48 of the Bankruptcy Act for services performed in a bankruptcy proceeding which has been superseded by a Section 77B reorganization proceeding.

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* The reorganization proceeding is still being carried on. A plan of reorganization was not confirmed until June 13, 1935, almost one year after the reorganization proceeding was begun; the plan has not yet been consummated.

Summary of Argument.

The allowance to the petitioners was fixed by a bankruptcy court in a bankruptcy proceeding for services rendered as trustees in bankruptcy in that proceeding. Section 48 of the Bankruptcy Act is applicable to and limits the compensation of trustees in bankruptcy and the compensation allowed by the court below was the maximum permitted by Section 48.

The fact that a proceeding for reorganization under Section 77B superseded the bankruptcy proceeding does not remove the limitation on compensation of trustees in bankruptcy for bankruptcy services. On the contrary, Section 77B, subdivision (i) specifically makes provision only for the payment of "such reasonable * * * allowances in the prior proceeding as may be *fixed* by the court appointing said receiver or prior trustee." Nothing in Section 77B remotely suggests that the prior court in *fixing* allowances is free of the express statutory limitations imposed by other existing sections of the Bankruptcy Act, such as Section 48.

That Congress had in mind that other sections of the Bankruptcy Act could not appropriately apply to *"proceedings instituted under"* Section 77B is shown by the language of subdivision (k) of that section. No attempt was made to exclude or change any rules or restrictions applicable to prior proceedings.

The prior bankruptcy proceeding and the Section 77B proceeding are entirely independent and separate proceedings. Independent express statutory provisions exist and are applicable to each in *fixing* the compensation of its own officers.

To hold that Congress intended by implication to remove the limitations of Section 48 would do violence to the unambiguous and careful language used in Section 77B; it would also run directly counter to the expressed intent of Congress that administrative costs be kept at a minimum.

If, nevertheless, this Court should determine that Section 48 is inapplicable to the petitioners' allowance, the allowance of $90,000 made by the District Court should not be rein-

stated. Even the amount of $60,000 recommended by the referee would be unreasonable, excessive and exorbitant. The services of the petitioners as bankruptcy trustees were part time services, lasted less than ten months, and were preliminary and inconclusive in character. The amount of $14,628.50 which the lower court allowed by an application of Section 48 more nearly approximates a reasonable allowance for such services.

If, therefore, this Court should hold Section 48 inapplicable, we submit for the reasons given below that it may properly, and should, either determine what constitutes reasonable compensation or remand the matter to the Circuit Court of Appeals for its determination in accordance with rules and standards laid down by this Court.

ARGUMENT.

POINT I.

The allowance to the petitioners was fixed in a bankruptcy proceeding for services rendered as trustees in bankruptcy in that proceeding. The amount awarded is the maximum permitted by the Bankruptcy Act.

A.

Section 48 applies to compensation of trustees in a bankruptcy proceeding. Section 77B provides that the court in the prior bankruptcy proceeding must fix allowances for bankruptcy services and does not remove or affect in any way the limitations imposed by Section 48 on the prior bankruptcy court.

As public officers appointed under Sections 33 and 44 of the Bankruptcy Act, the petitioners must show "clear warrant of law" to be entitled to compensation for the perform-

ance of their duties.* Their compensation obviously cannot exceed the maximum permitted by the statute under which they were appointed.

The allowance to the petitioners as trustees in bankruptcy was fixed by a *bankruptcy* court for services rendered in a *bankruptcy proceeding.*

Section 48 of the Bankruptcy Act fixes the maximum compensation allowable to trustees in bankruptcy, providing that they "shall receive for their services * * * such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed by the courts, not to exceed" the limitations therein set forth. (Sec. 48 (a), 11 U. S. C. Sec. 76 (a)).† The amount awarded by the lower court to the petitioners was the maximum permitted by this Section.

It necessarily follows that the limitations as to their compensation imposed by Section 48 are applicable, unless it can be clearly shown that Section 77B otherwise provides.

On June 7, 1934, Section 77B was added to the Bankruptcy Act and on June 22, 1934, the bankruptcy proceeding in which the allowance was later fixed was superseded by the institution of a Section 77B reorganization proceeding.

Subdivision (i) of Section 77B provides that when a trustee of the property of a corporation has been appointed and is acting in a prior proceeding at the time the Section 77B proceeding is commenced, the judge in the latter proceeding

> "shall make such orders as he may deem equitable * * * for the payment of such *reasonable* administrative expenses and *allowances in the prior proceeding as may be ...ed by the court appointing said * * * prior trustee.*'‡ (Italics supplied.)

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* See *Realty Associates Securities Corporation* v. *O'Connor*, 295 U. S. 295, at p. 299. The same section of the Bankruptcy Act which creates the office of referee also creates the office of trustee (Section 33).

† See Appendix, pp. 36-37, for full text of subdivisions (a), (b) and (e) of Section 48, and of Sections 33 and 44.

‡ For the full text of subdivision (i) of Section 77B, see Appendix, pages 38-39.

The language quoted expressly provides that the court in the *prior proceeding* (in this case the bankruptcy court), is to fix the allowance of the prior trustee. Nothing in the quoted language remotely suggests the removal of any restriction or limitation (such as Section 48) imposed upon the prior court in fixing of allowances for services rendered in the prior proceeding.

The quoted language expressly recognizes the fact that the prior proceeding and the Section 77B proceeding are independent proceedings. Each has its own independent provisions for the fixing of trustees' compensation. Section 77B, subdivision (c), covers trustees appointed and acting in a proceeding instituted under Section 77B and subdivision (k) provides that Section 48 does not apply to such compensation. Section 48 establishes the maximum which a bankruptcy court may allow the trustees in a bankruptcy proceeding.

The petitioners admit that it is the court in the prior proceeding which is called upon to fix their compensation (Br., pp. 7, 15-16, 20). In spite of this admission based on the plain language used in Section 77B (i), and their statement that "it is not the contention of the petitioners * * * that Section 77B (i) does away with or in any way affects the restrictions or limitations found in Section 48" (Br. p. 17), the petitioners are apparently attempting to construe the word "reasonable" as used in Section 77B (i) either to do away with the limitations of Section 48 or to substitute a new rule for the court *in the prior proceeding* to use in fixing fees. As a matter of law, allowances to trustees in bankruptcy have always had to be *reasonable* within the limitations of Section 48 and the use of the word "reasonable" establishes no new standard even in bankruptcy.

In re Morris Bros., 8 F. (2d) 629.

Clearly, the word "reasonable" was inserted in subdivision (i) of Section 77B, not to remove existing limitations on the allowances of the prior court, but to give the Section 77B

judge the right, before directing payment, to *review* the allowances fixed by the prior court. Obviously, the prior proceedings may be state court receiverships, or federal equity receiverships, as well as prior bankruptcy proceedings. Even in a *prior* bankruptcy proceeding, an allowance to trustees may be unreasonable though below the maximum permitted by Section 48.* Congress clearly intended to give the Section 77B judge the right to protect the debtor's estate by providing for a right of review. Without such right, the Section 77B judge, having the debtor's estate under his sole control, would have no check on payments to be made therefrom upon orders of a prior state or federal court.

Not only does it appear clear from subdivision (i) itself that the word "reasonable" was inserted to provide such right of review, but the courts have so held.

In re New York Investors, Inc., 79 F. (2d) 179; certiorari denied, — U. S. —, Dec. 9, 1935;
In re 211 East Delaware Place Bldg. Corporation, 7 F. Supp. 892.

In *In re New York Investors, Inc., supra,* at page 181, the Circuit Court of Appeals for the Second Circuit said, with reference to subdivision (i) of Section 77B:

> "We think these provisions were inserted in the act in order to give the court in charge of the reorganization proceedings the benefit of the experience of the prior court, in estimating the fair value of the services of such persons as are entitled to compensation. There could be no sufficient reason for providing that the Section 77B court should make such orders as it might deem equitable 'for the payment of * * * reasonable administrative expenses and allowances in the prior proceeding' unless it were to have the power to reduce and to decline to pay such as were unreasonable. Any-

* In one bankruptcy proceeding, prior to its being superseded by a proceeding under Section 77B, a large dividend had been paid to creditors on which the maximum limit of trustee's compensation could be based under Section 48. The dividend amounted to 50% of claims. *Matter of United Cigar Stores Company of America, Bankrupt*, Southern District of New York.

> thing less than this would render the words 'equitable' and 'reasonable' nothing more than hortatory terms designed to exhort the prior court to practice moderation."

As the court below said (R. 290):

> "We think it plain that the words *'equitable' and 'reasonable'* were intended to mean 'reasonable' in the eyes of the reorganization court, and *were to serve only as a check by the section 77B court* on payments which might affect the proposed reorganization unfairly." (Italics ours.)

The petitioners concede (Br. pp. 15-17, 19) the correctness of the determination by the court below that the word "reasonable" was inserted to provide the judge in the Section 77B proceeding with the important right to review allowances fixed in the prior proceeding. They are in error however in implying (Br. p. 16) that the court below has placed a different construction on the right of review under subdivision (i) of Section 77B in the instant case involving a bankruptcy proceeding superseded by a reorganization proceeding and in *In re New York Investors, supra,* which it decided on the same day and which involved allowances in an equity receivership superseded by a reorganization proceeding. The court below said (R. 289):

> "We have discussed the application of section 77B (i) in Matter of New York Investors, Inc. (C. C. A.) 79 F. (2d) 182, so far as it relates to the fixing of fees in a prior equity receivership. *The principles involved where the prior insolvency proceeding is in bankruptcy are the same.*" (Italics ours.)

Possibly the fact that there is no mathematical statutory limitation on fees payable in equity receiverships has led the petitioners into thinking that a different principle had been applied.

As the Court below said (R. 290-291):

> "Under 77B (i) the reorganization court is given power to pay allowances which have been fixed by the prior court

only to the extent that they are found reasonable. Nothing in the language of the subdivision suggests the removal of any restriction which may exist upon the prior court in the determination of allowances. Indeed it is impossible to imagine that court awarding compensation in excess of limitations imposed by a statute to which its orders are made subject."

No comfort can be gained by the petitioners from the use of the word "equitable" in subdivision (i) of Section 77B. The words "as he may deem equitable" were necessarily used in connection with the power to make orders "for the protection of obligations incurred by the receiver or prior trustee." It is clear that the word "equitable" as used in the statute means in relation to situations existing in the reorganization proceeding, rather than with respect to the size of the compensation, which is already covered by the word "reasonable".

When petitioners filed their application, they themselves "verily believed" (R. 98) that Section 48 fixed the measure of their compensation.* They attempted, however, to include property, as well as moneys, as a proper measure for compensation.† Now their entire argument is based on a contention which we submit we have shown to be fallacious, that Section 48, although admittedly not amended or affected by Section 77B (petitioners' brief p. 17) is somehow inapplicable.

As a final argument, on page 22 of their Brief, the petitioners appear to contend that the provisions of subdivision (k) of Section 77B in some manner exclude the applicability of Section 48 to the fixing of allowances in prior proceedings superseded by reorganization proceedings.

Subdivision (k)‡ reads, in part, as follows:

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* In *Stitt* v. *Reconstruction Finance Corporation*, No. 540, the Referee *contends* that Section 40 applies to his compensation. The principle is exactly the same.

† Section 48 specifies "moneys". The Circuit Court of Appeals dismissed petitioners' contention (R. 291-292), and petitioners are not now urging it and in fact admit that properties may not be included (Petitioners' Brief, p. 11).

‡ For the full text of subdivision (k), see Appendix, page 39.

"If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section: * * * (3) a trustee or trustees shall be appointed as provided in Section 44 and be compensated as provided in section 48: * * *. *None of the sections enumerated in this subdivision (k)* except * * * [here are excepted sections other than section 48] * * * *shall apply to proceedings instituted under this section 77B* unless and until an order has been entered directing the trustee or trustees to liquidate the estate. *All other provisions of this act,* except such as are inconsistent with the provisions of this section 77B, *shall apply to proceedings instituted under this section,* whether or not an order to liquidate the estate has been entered." (Italics supplied.)

Subdivision (k) by its very terms is dealing only with *"proceedings instituted under this section 77B."* The language is not applicable to any other proceeding and by subdivision (i), the fixing of bankruptcy allowances is for the bankruptcy court in the *prior proceeding.* As pointed out above, a prior bankruptcy proceeding and a Section 77B proceeding are entirely separate and independent proceedings. Each has its own statutory provisions governing the compensation of its own officers.

Obviously the only effect of the provision in subdivision (k) is to make Section 48 inapplicable to *"proceedings instituted under this Section 77B,"* until an order of liquidation is entered. *By no possible inference can this language be made applicable to a prior bankruptcy proceeding.*

B.

To hold that Section 48 is inapplicable would be contrary to Congressional intent as repeatedly expressed to keep administrative costs at a minimum. The general language of Section 77B is unambiguous and no amendment, modification or repeal of the specific provisions of Section 48 can be implied.

To construe the unambiguous language of subdivision (i) of Section 77B so as to remove the limitations of Section 48 would run directly counter to the intent of Congress that administrative costs be kept at a minimum.

Throughout the entire Bankruptcy Act the intent of Congress to avoid excessive costs is apparent. Economy in administration is the aim of the Act. Not satisfied with setting forth express limitations upon compensation of receivers, trustees and referees in Sections 48 and 40, Congress inserted in Section 72 a provision that

> "Neither the referee, receiver, marshal or trustee shall *in any form or guise* receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act." (Italics ours.)

The very Act of Congress in which the new Section 77B was included shows that Congress had in mind the necessity for limiting compensation in bankruptcy administration. Section 3 of the Act of June 7, 1934 provides in part:

> "The compensation allowed a * * * trustee * * * *shall in no case be excessive or exorbitant, and the court in fixing such compensation shall have in mind the conservation and preservation of the estate* of the bankrupt and the interests of the creditors therein." (Italics ours.)

The report of the House Judiciary Committee, dated June 2, 1934, on the proposed Section 77B (then known as H. R.

5884) clearly shows that the main purpose of Section 77B was to *reduce the cost* of reorganizing corporations.

The necessity for limiting compensation and avoiding excessive costs, as well as the Congressional intent to do so, has been recognized repeatedly by the courts. As recently as April 29, 1935, in *Realty Associates Securities Corporation, et al.* v. *O'Connor* (295 U. S. 295), this Court stated (at p. 299):

> "Extravagant costs of administration in the winding up of estates in bankruptcy have been denounced as crying evils. Strengthening Procedure in the Bankruptcy System, Sen. Doc. No. 65, 72d Congress, 1st Sess. (1932), p. 53; also H. R. Rep. 65, 55th Congress, 2d Sess. (1898), p. 44. In response to those complaints, Congress has attempted in the enactment of the present statute to fix a limit for expenses growing out of the services of referees and receivers."

See also

Continental Illinois National Bank v. *Chicago, Rock Island & Pacific R. R. Co. et al.*, 294 U. S. 648, decided April 1, 1935, at page 685, involving a railroad reorganization under Section 77 of the Bankruptcy Act;

In re Consolidated Distributors, Inc., 298 Fed. 859 (C. C. A. 2nd, 1924), at page 862;

In re Curtis, 100 Fed. 784 (C. C. A. 7th, 1900), at page 792.

The petitioners concede in their brief (p. 21) that, in enacting Section 77B, "it was the purpose of Congress to lessen the cost of insolvency proceedings which had long been regarded as too great."

Nevertheless, the petitioners contend for a construction which attempts to *remove* by implication only, an express limitation on allowances in the prior proceeding provided for by Section 48 and flies directly in the face of the Congressional purpose admitted by the petitioners.

In view of the clearly and repeatedly expressed Congressional policy for economy in bankruptcy administration it is inconceivable that Congress could be held to have intended to remove the limitations of Section 48 *without a clear and unambiguous expression of such intent.*

As the court below stated (R. 291):

> "It seems equally unlikely that the reorganization court should be empowered by mere implication to make allowances for services by the agencies of another court which the statutes governing the action of that court forbid."

The petitioners do not contend that the judge in a proceeding under Section 77B is given any power by the word "reasonable" in subdivision (i) to increase the amount of the allowances fixed by the court in the prior proceeding (Br., pp. 19-20). Any attempt to imply such a power in the reorganization court to increase allowances would render nugatory by implication merely the specific provisions of Section 48.* Similarly it would render nugatory the express provisions of Section 40 with regard to referees in bankruptcy.

The petitioners' contention that Section 77B substitutes "a reasonable allowance for a statutory allowance" (Br., p. 21) and that therefore Section 48 is not applicable to their compensation represents an attempt to use the general language of the later statute to repeal by implication the specific language of Section 48. Such a construction would be contrary to the well-settled principle of statutory construction frequently enunciated by this Court.

See

Washington v. *Miller,* 235 U. S. 422, 428;
Kepner v. *U. S.,* 195 U. S. 100, 125;
U. S, v. *Nix,* 189 U. S. 199, 205;
Rodgers v. *U. S.,* 185 U. S. 83, 87-89.

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* In accord with the decision of the court below is *In re Paramount Publix Corporation,* 12 F. Supp. 16, a case squarely in point. No other cases dealing with this point have been found.

See also

Posadas v. *National City Bank of New York*, U. S. , decided January 6, 1936, reported in Volume 3, United States Law Week, page 389, at p. 390;

Frost v. *Wenie*, 157 U. S. 46, 58.

In *Washington* v. *Miller*, *supra*, the Court stated at page 428:

> "In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (United States v. Healey, 160 U. S. 136, 146; United States v. Greathouse, 166 U. S. 601, 605); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (Townsend v. Little, 109 U. S. 504, 512; Ex parte Crow Dog, Id. 556, 570; Rodgers v. United States, 185 U. S. 83, 87-89); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized."

The construction of the statutes contended for by the petitioners in the instant case is directly contrary to the rule enunciated by this Court. No irreconcilable conflict exists between Section 48, the earlier special statute, and Section 77B (i), the later general one. No language indicating repeal or amendment of Section 48 is contained in Section 77B. Effect can be given both to the limitations of Section 48 and to the right of review provided for in subdivision (i) of Section 77B.

We submit that both Section 48 and Section 77B mean what they say and that the lower court correctly held Section 48 applicable to petitioners' compensation as trustees in bankruptcy in a bankruptcy proceeding.

C.

Contrary to petitioners' assertion, Section 48 has been held applicable in analogous situations where no liquidation or composition has occurred; supposed hardship is disregarded.

The petitioners appear to contend in their brief (pp. 11 and 12) that Section 48 should be held inapplicable to bankruptcy trustees' compensation when the bankruptcy proceeding is terminated by a Section 77B proceeding, because no provision is made in Section 48 for commissions to bankruptcy trustees where property has been turned over by them in kind, and because the Section is stated not to meet the situation which arises when the bankruptcy proceeding is cut off without a liquidation or a composition.

The petitioners have evidently not considered the case of

In re Detroit Mortgage Corporation, 12 Fed. (2d) 889, certiorari denied 273 U. S. 713.

In that case the Circuit Court held that Section 48 applied to the compensation of a bankruptcy receiver where the bankruptcy proceedings were abruptly terminated (without liquidation or composition) by the dismissal of the petitioning creditors' petition, the court saying, at page 891:

> *"Clearly, too, under section 48, no compensation can be based upon the value of property turned back* to the alleged bankrupt. *However great the hardship* resulting from this construction, *the language of the act* is in *this respect entirely clear."* (Italics ours.)

Other decisions involving the rule that irrespective of the question of hardship, Section 48 is applicable even where the major part of the assets "turned over" consists of properties and not moneys, include the following:

In re Morris Bros., 8 F. (2d) 629;
In re Chimovitz, et al., 30 F. (2d) 114.

See also

American Surety Co. v. *Freed,* 224 Fed. 333.

In *In re Morris Bros., supra,* the court stated at page 630:

> "Unless, therefore, the law authorizes the payment of commission on property turned over by the referee to the claimants, such compensation cannot be allowed, however meritorious. It seems to me that the statute is plain and unambiguous. The commissions of the referee are to be computed on '*moneys* disbursed to creditors,' and that of the trustee 'on *moneys* disbursed or turned over to any persons including the lienholders.' In each case it is the moneys disbursed or turned over, and not property, that forms the basis for such allowance. It may be that this will work a hardship in some cases, and perhaps in the instant case; but that affords no reason why the law as written should not be observed." (Italics are the court's.)

See also *In re Curtis,* 100 Fed. 784, where the court said at page 792:

> *"The present act,* so far as it specifies the amount of fees of officers whose services may be required in execution of the law, *fixes them at a low figure, possibly much lower than is compensation for the service; but it is not for us, for that reason, to disregard the law, or seek to thwart the design of Congress, however inadequate we may think the compensation allowed."* (Italics ours.)

D.

The holding that Section 48 is applicable will not have the deleterious effect on future bankruptcy administration feared by the petitioners.

The petitioners contend (Br., pp. 8, 18) that if the restrictions of Section 48 are held applicable to allowances for services in a bankruptcy later superseded by a Section 77B proceeding, trustees in bankruptcy will be tempted to liquidate assets with a view to increasing their commissions.

The asserted danger of unwise liquidation is of course without substance, as bankruptcy trustees can sell assets only under court supervision. If creditors cannot be relied upon

to elect men as trustees who would shrink from administering their trust solely for their own advantage, the courts may be relied upon to avoid precipitous or ill-advised sales recommended by trustees merely for their own ends.

It seems clear that as a practical matter, all financially embarrassed corporations desiring to reorganize will either go directly under Section 77B (rather than into ordinary bankruptcy) or, if forced into ordinary bankruptcy, will immediately go under Section 77B as permitted by the provisions of subdivision (a) of Section 77B, which provides in part:

> "(a) Any corporation * * * may file an original petition, or, before adjudication in an involuntary proceeding, an answer, or in any proceeding pending in bankruptcy, whether filed before or after this section becomes effective, * * * a petition * * * that it desires to effect a plan of reorganization."

See *In re Kelly-Springfield Tire Co.*, D. C., Maryland, November, 1935 (reported in Commerce Clearing House, Bankruptcy Law Service, Decisions Volume, p. 1766), in which the court stated that the desirability of avoiding prior insolvency proceedings is, it thought, "now commonly understood by the Bar."

Section 77B had not been enacted at the time the bankruptcy proceeding involved in this case was begun. Its provisions were not available to corporations in need of reorganization.

It is highly unlikely that in the future any Section 77B proceedings will, except in isolated instances, supersede ordinary bankruptcy proceedings, and that the contingencies feared by the petitioners will not as a practical matter ever arise.

POINT II.

If it should be held that Section 48 is inapplicable, the allowance of $90,000 by the District Court was clearly unreasonable, excessive and exorbitant and this Court should determine what constitutes reasonable compensation for the petitioners' services of less than ten months as trustees in bankruptcy, or remand the matter to the Circuit Court of Appeals for determination in accordance with principles laid down by this Court. The $14,628.50 awarded below more nearly approximates a reasonable allowance.

We submit that it is clear as a matter of law that Section 48 limits the allowance to the petitioners for their bankruptcy services and that the lower court in allowing them $14,628.50 has allowed the maximum to which they are entitled.

If, however, this Court should hold Section 48 inapplicable, the orders of the District Court,* allowing $90,000 to the petitioners, should not be affirmed as the allowance of that amount was unreasonable, excessive and exorbitant.

The lower court in its opinion stated (R. 292):

> "While we should allow a substantially larger compensation if we were at liberty to disregard Section 48 (a) the amount awarded by the District Court was plainly excessive. The services of the trustees only lasted ten months, were in many respects preliminary to a reorganization and were far less burdensome than those of their counsel."

It is obvious that the lower court, having determined that Section 48 applied, did not have to analyze carefully the work

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* Without any further hearing or notice to creditors, the District Court increased the $60,000 recommended by the referee by fifty per cent. and allowed $90,000. Even the amount recommended by the referee was in excess of the highest amount suggested by any creditor at the hearing before him.

actually done by the petitioners and determine what amount would constitute reasonable compensation. The amount of $90,000 was "plainly excessive". We submit that the award of $14,628.50 more nearly approximates a reasonable allowance.

If, therefore, this Court should hold Section 48 inapplicable, we submit that it may properly* and should either determine the amount which would constitute reasonable compensation for the petitioners or remand the matter to the Circuit Court of Appeals for determination laying down such rules or standards as may be necessary. Otherwise, a reversal on the question of law alone might be taken as an indication of acquiescence in the reasonableness of the allowance made by the District Court.

A

The petitioners have sought to convey the impression that the construction of the Bankruptcy Act urged by the Respondent has resulted in a grossly inadequate award (Br. p. 10). It is submitted that an analysis of their services as shown by the record fails to support their contention.

1. During the period of less than ten months from August 25, 1933 until June 22, 1934, the petitioners devoted only a part of their time to the administration of the estate. In fact it appears that in the case of each trustee the administration of this estate was merely incidental to his other businesses or profession. Mr. Greve was engaged in many business activities not related to the bankrupt (R. 252), from which he derived considerable income† (R. 248), and the

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* This Court has power to dispose of all questions relating to the reasonableness of the allowance to the petitioners, irrespective of the ground on which certiorari was granted and even though it should hold for petitioners on the question of the applicability of Section 48. *Langnes* v. *Green*, 282 U. S. 531; *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555.

† It seems that Mr. Greve's duties as trustee did not deprive him of other substantial compensation at least during the first half of the bankruptcy period. The trustees state that during 1933 Mr. Greve "performed the principal part of services" in certain matters "involving the affairs of the Bank of the United States, for which one of the corporations with which he was connected received in excess of $150,000" (R.

other trustees, who frankly admit that they were not experienced in the business of the bankrupt (R. 18), were actively engaged in the practice of law (R. 248, 249, 252).

The fact that the trustees did not devote full time to this estate is not stated in criticism. As indicated below, this was not a case in which full time services of a trustee were required. That fact has a direct bearing on the amount which would constitute reasonable compensation.

There is no reason why the appointment of three trustees should result in a fee larger than one trustee would receive unless the trustees did more work than one trustee could have done. Petitioners' application shows that most of the work was done by one trustee and that it did not occupy his full time.* No reason appears for awarding compensation larger in amount than one man would be reasonably entitled to receive for the services performed.†

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248). In the hearing before the Sabath Committee it was brought out that Mr. Greve also received $54,580.39 during 1933 for serving as an official of The Prudence Co. Inc., and in addition other amounts as salaries from New York Investors, Inc., of which company the bankrupt was a subsidiary (see report of hearing in the New York Times, October 17, 1935). From Chase National Bank v. Clark Henry Corporation, Misc. , 283 N. Y. S. 25, it appears that Mr. Greve was a member of the principal committee assisting in the reorganization of a corporation owning a large hotel. The court remarked that Mr. Greve and the other members of his committee "are all interested in the progress of the Borough of Brooklyn, and the success or failure of this enterprise is of importance to Brooklyn and to them. Therefore, it is necessary to ask men with knowledge and experience to contribute some of their time for the public good." The court, accordingly, allowed $11,000 of the $50,000 requested by the committee.

* Mr. Greve handled the more important matters pertaining to the Brooklyn Paramount Theatre (R. 40). He arranged for and attended all meetings with representatives of the bondholders who were threatening to foreclose (R. 41). He attended almost all the Paramount Publix meetings (R. 52) and generally handled the negotiations with that company's officials and trustees (R. 58, 64, 91) and he also took charge of the Loew negotiations (R. 76, 77).

† This principle is recognized in bankruptcy administration in the provisions of Section 48(b) providing that where three trustees act the court shall apportion fees and commissions between them "so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to". While by hypothesis Section 48(b) cannot determine compensation where Section 48 does not apply, it may be said to indicate the principle involved.

2. The services here involved are limited to the bankruptcy services rendered from August 25, 1933, to June 22, 1934, when the bankruptcy proceeding was superseded. Much of the petitioners' lengthy and redundant application for compensation relates to matters that were not completed until after the termination of the bankruptcy proceeding. For services rendered thereafter, the petitioners who were also appointed trustees in the Section 77B proceeding will be compensated in that proceeding (R. 292).

3. The bankrupt was a real estate holding company, with total assets valued by the trustees at $14,205,996.18 (R. 100). Its principal assets consisted of seven motion picture theatre buildings, a participation of $825,000 in a note of Ringling Bros. and others, and cash on hand (R. 8-17, 100). The bankrupt also had important claims against the lessees' of such buildings, which required primarily legal work and are discussed generally below. The conduct of the business required very little administrative work since all of the bankrupt's real properties were leased to and managed or operated by other corporations (R. 13-17). For the most part the arrangements under which the theatres were leased or operated by others were made prior to the bankruptcy and were continued without change, the only apparent exception relating to certain modifications of the arrangement as to one of the theatres. The actual business administration was therefore extremely simple in character.

4. A fuller analysis of the services of the petitioners during the bankruptcy proceeding shows clearly that the administration of the business was not burdensome and that the petitioners' accomplishments during the bankruptcy period were of a preliminary and inconclusive nature. It was not until June 13, 1935, almost one year after the bankruptcy proceedings terminated, that a plan of reorganization was finally confirmed. This plan has not even yet been consummated.

On August 8, 1933, the date of adjudication, the principal assets of the bankrupt consisted of seven motion picture theatres, all subject to long-term lease or purchase contracts to Paramount Publix Corporation. The contracts as to three of the theatres had been assigned to Loew's Theatre & Realty Corporation and guaranteed by Loew's, Incorporated (R. 105-106). Prior to August 8, 1933, both Paramount Publix Corporation and the Loew companies had defaulted on their contracts and temporary leasing arrangements covering the seven theatres had been entered into by the bankrupt (R. 106).

The petitioners exercised only a very general supervision as landlords over the management of all seven theatres. An office building in which one of the theatres was located was managed, not by the petitioners, but by a management company pursuant to a contract entered into prior to the bankruptcy (R. 13-15).

During the bankruptcy proceeding, the petitioners continued all the temporary leasing arrangements without change (R. 14-17) except for certain modifications relating to one of the theatres controlled by Paramount (R. 142-143). These modifications involved negotiations by the petitioners and their counsel with the Paramount interests (R. 68, 82, 86) and questions of business judgment as to the policy of operating the theatre on a straight picture basis or on a picture and stage show basis (R. 51).

During the bankruptcy the petitioners filed an amended increased claim against Paramount in its bankruptcy proceeding, prepared by the petitioners' counsel (R. 29, 38), and commenced negotiations with the Paramount trustees looking towards a settlement (R. 64, 83-84, 95). No final settlement was negotiated until several months after the completion of the bankruptcy proceeding (R. 230), and the settlement was not approved by the Allied Owners Corporation Section 77B court until June 14, 1935.

During the bankruptcy the petitioners through their counsel took charge of the suits theretofore commenced by the Cor-

poration against the Loew companies, and commenced a third action. The actual steps taken during bankruptcy by the petitioners' counsel were confined to the preparation of pleadings, study of facts and of questions of law, preparation for trial and various preliminary skirmishes. Although the record shows that the petitioners were consulted, it is obvious that substantially all of the work was done by their counsel and not by the petitioners (R. 51, 111-121).

During the bankruptcy, negotiations for the settlement of the Loew litigation were carried on by the petitioners, their counsel, and creditors of Allied Owners Corporation. Although very substantial progress towards settlement was made, a settlement agreement was not signed until July 25, 1934, more than one month after the end of the bankruptcy proceeding. The settlement agreement was later amended, and was not approved in the Section 77B proceeding until June 13, 1935.

During the bankruptcy proceeding, attempted foreclosure proceedings by the trustee of the first mortgage bonds of Allied Owners Corporation were successfully resisted; obviously the major part of the work in connection therewith was done by the petitioners' counsel (R. 124-127).

The only important asset of the corporation, in addition to the seven theatres, was a participation of $828,000 in a note of Ringling Brothers—Barnum & Bailey Combined Shows, Inc. and Circus City's Zoological Gardens, Inc., endorsed by John Ringling. The note is not due until 1937, and all interest has been paid thereon to date. The status of the note remained unchanged during the bankruptcy proceeding, the petitioners' counsel, however, successfully resisting two legal proceedings brought by John Ringling in an attempt to rescind the pledge of the collateral securing his guaranty (R. 8-10, 134-140).

Although considerable space was devoted by the petitioners in their application for an allowance to the fact that a basis for reorganization was laid during the bankruptcy proceeding (R. 74, 76, 77, 78, 97), it is obvious that the progress

made during bankruptcy was of a very preliminary and inconclusive nature. It was not until months after the bankruptcy had been superseded that the Paramount settlement was worked out and although considerable negotiating had been done with respect to the Loew settlement, the settlement agreement was not signed until after such termination and it was later amended. These settlements involved all seven of the theatre buildings held by the bankrupt. No definitive reorganization plan whatsoever was worked out during bankruptcy.

It will thus be seen that the administrative work in conducting the business was very simple in character and involved only a landlord's interest in buildings leased or managed and operated by others under agreement. The other problems involved were limited to a few major items and were largely legal in character.* As stated by the lower court, the petitioners' services "were in many respects preliminary to a reorganization and were far less burdensome than those of their counsel" (R. 292). It is submitted that the petitioners' allowances should in any event be very substantially lower than the allowance to their counsel.

See *In Re Insull Utility Investments,* 6 Fed. Supp. 653 (affirmed 74 F. (2d) 510), at page 662, where the court said:

> "Receiverships, as far as fees are concerned, are of two kinds. One class calls for administrative work such as the operation of a manufacturing plant or the running of a public utility. Here the receiver renders the greater service. In the other class of cases, the problems are legal in nature and demand the rendition of legal services in following assets which have disappeared or which have been transferred, etc. In the latter class, the attorneys render the more important service."

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* NOTE: See, for example, the petitioners' own application for an allowance at R. 6, 9, 27, 41-43, 44, 57-58, 85-86, 88, 96-97. See also application of petitioners' counsel, R. 102-160. The extent to which the trustees, two of whom are attorneys of long standing, relied upon their counsel even in matters of administration is surprising.

B.

The allowance made to the trustees by the District Court is clearly unreasonable, excessive and exorbitant considered in the light of the express Congressional intent to keep administrative costs at a minimum and the public policy favoring avoidance of excessive costs in administration of bankrupt estates. The situation, we respectfully suggest, calls for expression of its views by this Court if allowances are to be kept within bounds.

Excessive fees have for a long time been one of the principal evils which Congress has sought to eradicate from the bankruptcy system. "The chief cause of the down-fall of the Bankruptcy Act of 1867 was its extravagance. Estates were swallowed up in fees and expenses until finally the very name of bankruptcy law became a synonym for licensed plundering of creditors' estates, and its administration became odious in the eyes of the people."[1]

When the Bankruptcy Act of 1898 was subsequently adopted, the framers of the act manifested "the utmost solicitude to guard against extravagance."[2] Throughout the entire Act the intent of Congress to avoid excessive costs is apparent. Not satisfied with setting forth express limitations upon compensation of receivers, trustees and referees in Sections 48 and 40, Congress inserted in Section 72 a provision that

> "Neither the referee, receiver, marshal or trustee shall *in any form or guise* receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act." (Italics added.)

However, the hope that waste had been abolished was not fulfilled and extravagance was frequently the despair of creditors. In 1933 a Senate Committee reported that administration expenses amounted "virtually to a confiscation of the

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[1] Remington on Bankruptcy—3rd Ed., Vol. 6, Sec. 2632.
[2] *Ibid.*—Sec. 2632,

rights of creditors."[3] In response to those complaints, Congress when enacting Sections 77 and 77B of the Bankruptcy Act attempted to "hit the evil of extravagance."

Realty Associates Security Corporation, et al. v. *O'Connor, supra,* in which, at page 299, this Court remarked:

> "Extravagant costs of administration in the winding up of estates in bankruptcy have been denounced as crying evils."
>
> *Continental Illinois National Bank* v. *Chicago, supra.*

In the very act containing Section 77B[4] Congress again made its intention clear when it stated:

> "The compensation allowed a receiver or trustee or an attorney for a receiver or trustee shall in no case be excessive or exorbitant, and the court in fixing such compensation shall have in mind the conservation and preservation of the estate of the bankrupt and the interest of the creditors therein."

Senator Norris emphasized the purpose of that Section when he said on the floor of the Senate on May 2, 1934 (78 *Congressional Record,* p. 7909):

> "There ought to be something said about the receivers and the attorneys for receivers and their fees. It ought to be said, I think, that the amount of the fee of a receiver should be reasonable. *I believe that is the law now, but if we say it again, probably more attention will be paid to it."*[5]

Despite this plain and unmistakable intent on the part of Congress to lessen administration costs by cutting down al-

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[3] Preliminary Report—Investigation of Bankruptcy and Receivership Proceedings in the U. S. Courts (S. Report No. 365—73d Congress, 2d Session).

[4] Sec. 3 of the Act of June 7, 1934; 48 Stat. 923, Sec. 3.

[5] The Senator may well have had in mind a situation similar to that which prevailed in the Eastern District of New York where this estate is being administered. For the fiscal year ending June 30, 1935, it is reported that expenses of administration consumed 45.44% of all assets of estates being administered in that district, which was the highest ratio in the entire country. Vol. 9, *Journal of the National Association of Referees in Bankruptcy,* pages 115-116.

lowances to as low a basis as is consistent with the sound administration of bankrupt estates,[6] trustees, receivers and their counsel have continued to request enormous allowances.[7] In the case at bar, for instance, the trustees originally requested the sum of $142,059.96. (R. 99) (nearly ten times the amount which was finally awarded to them) for ten months of part-time service.

It is no wonder, therefore, that the amount of the compensation sought by bankruptcy and reorganization officials has stirred public indignation,[8] alarmed governmental officials,[9] and called forth rebukes from some of the lower courts.[10] As one court has remarked, many reorganization officials "seem to have lost their sense of proportion" and reorganizations have often degenerated into "a mad scramble for advantage."[11]

It is submitted that a declaration by this Court on the specific question of reasonable fees for reorganization officials is urgently needed if the usefulness of Section 77B is to be preserved. Trustees have been requesting compensation on the basis of past fees which were awarded during a period when excessive fees were a prevalent evil. This may be illustrated by the words of one of the trustees herein, who urges

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[6] *In Re Memphis St. Ry. Co.*, 11 F. Supp. 682, 684.

[7] In one case an aggregate of over $2,840,000 for services was requested,—*In Re Paramount Publix Corporation*—(unofficially reported in Commerce Clearing House Bankruptcy Service, Sec. 3637). This total was cut by the District Court to an aggregate of approximately $766,000. An aggregate of over $1,600,000 for services and expenses has been requested in the reorganization of Middle West Utilities Company (New York Times, January 23, 1936). See also, material mentioned in footnotes 9 and 10, *infra*.

[8] For an expression of extreme indignation, see the editorial in the New York World Telegram, July 20, 1935, at page 14. See also comment in the New York World Telegram of July 15, 1935, at page 22.

[9] See Preliminary Report of the House Committee for the Investigation of Real Estate Bondholders Reorganization (known as the Sabath Committee), House Report No. 35, 74th Congress, First Session. See also Volumes 1-8 of the Hearings before a Special Committee on Investigations of Bankruptcy and Receivership Proceedings in United States Courts, United States Senate, 73 Congress, 2d Session, Pursuant to S. Res. 75.

[10] *In Re Memphis St. Ry. Co.*, 11 F. Supp. 682; *In Re National Dept. Stores*, 11 F. Supp. 633.

[11] *In Re Memphis St. Ry Co., supra* 685.

that he is entitled to larger fees than those allowed below because he "has received a considerable number of what may be considered substantial fees and allowances in bankruptcy, equity and reorganization proceedings" (R. 249). Further, it is doubtful that general warnings will suffice. The situation is comparable to that presented in *In Re Gilbert*, 276 U. S. 294, when special masters were warned that excessive allowances would not be tolerated. There Mr. Chief Justice Taft said, at page 296:

> "We are desirous of making it clear *by our action* that the judges of the courts, in fixing allowances for services to court officers, should be most careful, and that vicarious generosity in such a matter could receive no countenance." (Italics ours.)

C.

That the allowance of $90,000 to the petitioners was excessive and exorbitant and that the award of $14,628.50 more nearly approximates a reasonable award is further shown by a comparison with the amounts recently allowed by some district courts and by the Interstate Commerce Commission in other receivership, bankruptcy and reorganization matters.

In *In Re Memphis St. Ry. Co.*, 11 F. Supp. 682, the District Court fixed reasonable allowance for two trustees who were administering a street railway company at $600 and $300 a month, respectively, a total of $900 per month, whereas even the reduced amount allowed the petitioners by the Circuit Court of Appeals is equivalent to approximately $1,500 per month. The debtor corporation in that case had gross assets of $17,601,489 (as compared with gross assets, as valued by the petitioners, in the instant case of $14,205,996.18 [R. 100]) and an annual gross income of $1,781,114.* Obviously, the administration of a street railway was a much more difficult and complicated task than the administration of the real estate corporation involved in this proceeding.

In *In Re Republic Gas Corporation* (not yet officially reported but unofficially reported in C. C. H. Bankruptcy Serv-

* Figures from page 4262 "Fitch Stock and Bond Manual", Volume 11, issue of September 20, 1935, Section XV.

ice Section 3734), a district judge in the Southern District of New York fixed the sum of $18,000 as fair and reasonable compensation for a trustee, who, for a period of one year, had administered the affairs of a debtor corporation *without the assistance of counsel.* In the instant case the trustees have been collectively compensated at the same rate and in addition their counsel has been compensated at the rate of $60,000 per annum (R. 293). The administration of the affairs of the debtor in that case was certainly as arduous as the administration of the bankrupt estate herein, since the debtor was a public utility with gross assets of $10,560,394 and an annual gross income of $2,314,126.*

In the *Chicago South Shore and South Bend Railroad* reorganization the Interstate Commerce Commission was asked to fix reasonable compensation for a trustee who was administering an electric interurban railroad approximately 90 miles in length. The railroad operated 64 passenger trains daily, approximately 51 per cent. of its revenue was derived from the carriage of freight, and it had 460 employees. The Interstate Commerce Commission fixed $500 a month (which is approximately equivalent to the amount allowed *each* of the petitioners by the Circuit Court of Appeals) as the reasonable compensation for one of the two trustees, leaving undetermined the question of compensation for the other trustee.†

Thus we find at least three instances involving corporations approximately equal to the bankrupt in size, where compensation has been awarded to trustees on a scale comparable to that awarded by the lower court, and in each case it is obvious, from the nature of the corporation being reorganized, that the problems of administration were more difficult and varied and the responsibilities at least as great as those presented by the administration of the bankrupt herein.

A comparison may also be made with the compensation of trustees in larger railroad reorganization proceedings under

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* Figures from page 2858 "Standard Bond Descriptions", Volume O-Z, Issue of Dec. 14, 1935, Volume 9, No. 916B, Section 11.

† Decision of the Interstate Commerce Commission (Finance Docket No. 101165) decided December 5, 1935.

Section 77 of the Bankruptcy Act. Certainly the duties and responsibilities connected with the operation of large and extensive railroad properties are more onerous than those which were cast upon the Trustees in Bankruptcy in the instant case.

In *In the Matter of Missouri Pacific Railroad Company, Debtor,* No. 6935 (D. C. E. D. Mo., Eastern Division), by order No. 43 entered June 22, 1933, the court fixed the compensation of trustee L. W. Baldwin (former head of the Road) at $3,000 per month and trustee Guy A. Thompson (former President of the American Bar Association) at $1500 per month. Those trustees are operating 7,406 miles of railroad, and have charge of property of a book value of $664,947,552, with funded debt outstanding of $575,031,300.

In *In the Matter of Chicago, Rock Island and Pacific Railway Company, Debtor,* No. 53209 (D. C. N. D. Ill., Eastern Division), by order No. 29-A entered March 17, 1934, the compensation of the trustees was fixed (until further order) as follows:

Governor Frank O. Lowden	$15,000 a year
Mr. James E. Gorman	$36,000 a year
Mr. Joseph B. Fleming	$15,000 a year.

These trustees, for an aggregate compensation of only $66,000 for a full year, operate 8,333 miles of road and are trustees of a debtor with assets of a gross book value of $548,712,145.

Clearly, the duties and responsibilities of these railroad reorganizations require "the cooperation of the best legal minds and business acumen" about which Judge Inch was so much concerned in his opinion.

It is therefore submitted not only that the amount of $90,000 "was plainly excessive" but that the amount of $14,628.50 awarded by the Circuit Court of Appeals more nearly approximates reasonable compensation for the petitioners' services which, from the undisputed facts in the record, involved for each of petitioners part time services extending over a period of less than ten months, did not interfere with the trustees carrying on their other businesses or profession,

included comparatively little administrative work and involved only a few major problems all of which were primarily legal in character.

CONCLUSION.

It is respectfully submitted that Section 48 of the Bankruptcy Act is applicable to the compensation of petitioners as trustees in bankruptcy and that the order of the Circuit Court of Appeals should accordingly be affirmed. If by any chance this Court should hold Section 48 inapplicable, it is respectfully submitted that this Court should, for the reasons stated above, either determine the amount which would constitute reasonable compensation for the services of the petitioners as trustees in bankruptcy or remand the matter to the Circuit Court of Appeals for determination laying down such rules and standards for its guidance as may be necessary.

Dated, February 1, 1936.

Respectfully submitted,

STANLEY REED,
Solicitor General.

JAMES B. ALLEY,
General Counsel, Reconstruction Finance Corporation.

MAX O'RELL TRUITT,
Solicitor, Reconstruction Finance Corporation.

ELI WHITNEY DEBEVOISE,
FRANCIS T. P. PLIMPTON,
Special Counsel, Reconstruction Finance Corporation.

HANS A. KLAGSBRUNN,
WILLIAM RADNER,
Attorneys, Reconstruction Finance Corporation.

Counsel for Respondent.

APPENDIX.

Statutory Provisions.

BANKRUPTCY ACT.

"CHAPTER 5.—OFFICERS, THEIR DUTIES AND COMPENSATION.

"Section 33. **Creation of Two Offices.** The offices of referee and trustee are created." (U. S. C., Title 11, § 61)

"Sec. 44. **Trustees; appointment.** The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so." (U. S. C. Title 11, § 72).

"Sec. 48. **Compensation of trustees, receivers and marshals.**—(a) Trustees shall receive for their services, payable after they are rendered, * * * such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed by the courts not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

(b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually

rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

* * * * * * *

(e) Where the business is conducted by trustees, * * * as provided in clause five of section *two* of this Act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lienholders, by them * * *; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: *Provided further*, that before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section *fifty-eight* of this Act." (U. S. Code, title 11, § 76.)

"Sec. 72. **Compensation restricted.**—Neither the referee, receiver, marshal, or trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act." (U. S. Code, title 11, § 112.)

§ 3 of the Act of Congress of June 7, 1934.

"* * * The compensation allowed a receiver or trustee or an attorney for a receiver or trustee shall in no case be excessive or exorbitant, and the court in fixing such compensation shall have in mind the conservation and preservation of the estate of the bankrupt and the interests of the creditors therein." (§ 3 of the Act of Congress of June 7, 1934, 48 Stat. at L. 923, included in 11 U. S. Code Anno. as § 76a.)

Section 77 B.—Corporate reorganizations.

"(c) Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him * * * (11) may refer any matters to a special master, who may be one of the referees in bankruptcy, for consideration and report, either generally or upon specified issues, and allow such master a reasonable compensation and reimbursement for his services and actual and necessary expenses. * * *"

"(i) If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court, whether before or after this amendatory Act takes effect, a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section, and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee. If a receiver or trustee has been appointed by a Federal or State or Territorial court prior to the institution of a proceeding under this section, and such proceeding shall be dismissed under subdivision (c), clause (8), of this section, the judge may include in the order of dismissal appropriate orders directing the trustee or trustees, or the debtor if no trustee is appointed, to transfer possession of the debtor's property within the territorial jurisdiction of such court to the receiver or prior trustee so appointed, upon such terms as the judge may deem equitable for the protection of obligations incurred by any trustee or trustees appointed under this section, and for the payment of administrative expenses and allowances in the proceeding hereunder. For the purposes of this section the words 'Federal court' shall include the district courts of the United States and of the Territories

and possessions to which this amendatory Act is or may hereafter be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska, and the District Court of the United States for the Territory of Hawaii." (U. S. Code, Title 11, § 207 (i)).

"(k) If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section: (1) The case may be referred to a referee as provided in section 22, who shall be compensated as provided in section 40; (2) the first meeting of creditors shall be held as provided in section 55, upon notice as provided in section 58; (3) a trustee or trustees shall be appointed as provided in section 44, and be compensated as provided in section 48; (4) claims which are provable under section 63 may be proved as provided in section 57, except that the time within which proof may be made shall not expire until six months after the date of the last publication of the notice of the first meeting; (5) debts shall be entitled to priority as provided in section 64; (6) sales shall be made as provided in subdivision (b) of section 70; (7) dividends may be declared and paid as provided in section 65. None of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j), and (m) of section 57, and subdivisions (a) and (e) of section 70, shall apply to proceedings instituted under this section 77B unless and until an order has been entered directing the trustee or trustees to liquidate the estate. All other provisions of this Act, except such as are inconsistent with the provisions of this section 77B, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors.' 'Bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequences and effect as an order of adjudication." (U. S. Code, Title 11 § 207 (k)).

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 540

THEODORE STITT,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THEODORE STITT,
Pro Se.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Theodore Stitt, petitioner, in person, respectfully prays that a writ of certiorari issue to review the decree (R. 423) of the United States Circuit Court of Appeals for the Second Circuit, made in the above entitled matter on July 29, 1935, and filed August 1, 1935, which decree reverses an order (R. 310) of the United States District Court for the Eastern District of New York, made March 11, 1935, fixing

the compensation of Theodore Stitt, as Referee in Bankruptcy, in the sum of $25,000, and said decree further reversing that portion of an order (R. 311, 313) of the United States District Court for the Eastern District of New York, made March 11, 1935, providing for the payment of said compensation.

Opinion.

The opinion of the Circuit Court of Appeals is not yet reported but is printed in the record (R. 415). That part relating to the referee's compensation is as follows:

> "The award of $25,000 to the referee was clearly erroneous. We have already shown that the reorganization court was without power to increase allowances fixed by the prior court and that the prior court was limited by the provisions of the Bankruptcy Act. Under Section 40 (a) of that act referees are only entitled to 'a fee of fifteen dollars * * * in each case * * * and twenty-five cents for every proof of claim filed for allowance * * * and from estates which have been administered before them one per centum commission on all moneys disbursed to creditors by the trustee * * *.' Under Section 40 (a) the referee here was limited to a fee of $15 and his filing fees and under Section 72 could not 'in any form or guise * * * receive any other or further compensation.' "

Jurisdiction.

The decree of the Circuit Court of Appeals was entered August 1, 1935 (R. 423). Petition for rehearing was denied September 18, 1935 (R. 434).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of Congress February 13, 1925 (U. S. Code, Title 28, Sec. 347).

Question Presented.

Whether a referee is entitled under Sections 77B (i), 40-a and 40-c of the Bankruptcy Act to receive equitable and reasonable compensation for services rendered by him from time of reference of bankruptcy proceeding to time of filing of petition under Section 77B.

Statement of Facts.

In view of the addition of Section 77B to the Bankruptcy Act since the commencement of the bankruptcy proceeding, the new interpretation of Section 40 with reference to referee's commissions (*Realty Associates Securities Corporation* v. *O'Connor*, 295 U. S. 295, 55 Sup. Ct. Rep. 663), made since the referee's allowance was fixed by the District Judge, and confirmation of reorganization plan also since the allowance was made, I respectfully submit the following chronological statement:

August 8, 1933:

Allied Owners Corporation adjudicated bankrupt and referred to Referee Stitt. Estate administered for ten months thereafter under referee's supervision.

June 7, 1934:

Allied Owners Corporation's petition under Section 77B filed and approved. Oscar A. Lewis, Esq., was designated as Special Master on the plan of reorganization, on consummation thereof after its confirmation, and on the adjudication of all large claims. Referee Stitt was designated as Special Master on filing of claims and countersignature of checks.

March 5, 1935:

Referee filed petition for allowance (R. 266) in the sum of $25,000.00 for services rendered from August 8, 1933, to

June 22, 1934, the date of the filing of 77B petition. This amount consisted of $23,977.00 commissions or 35⅖% of full commissions computed at ½% of total amount of undisputed claims and the sum of $1,023.00 for 4,092 claims filed at 25 cents per claim.

March 11, 1935:

Referee's application allowed in full by Judge Inch.

March 20, 1935:

Order to show cause signed by Judge Inch as to why referee's allowance should not be reduced on the application of Reconstruction Finance Corporation, a creditor.

May 13, 1935:

Order made by Judge Inch denying application of Reconstruction Finance Corporation to reduce referee's allowance.

June 13, 1935:

Allied Owners reorganization plan confirmed. No cash is being paid under the plan. Creditors are being paid in full on the face amount of allowed claims by the issuance of new bonds with deferred maturity and reduced interest to first mortgage bondholders and debenture bondholders, by the issuance of third lien notes to creditors secured by third mortgage and unsecured creditors Additional security for out-of-town theater mortgage bondholders.

Specifications of Error to be Urged.

The Circuit Court of Appeals erred:

(1) In holding that referee was not entitled to compensation under Sections 77B (i), 40-a and 40-c for ten months'

services except $15.00 filing fees and 25 cents for each claim.

(2) In holding that under Section 72 the referee is not entitled to part commissions.

(3) In failing to consider that part of Section 40-a upon which the referee's application for allowances was based together with Sections 77B (i) and 40-c.

Reasons for Granting the Writ.

(1) An important question of Federal law of general interest is involved which has never been decided by this Court, and which it is in the public interest to have decided by this Court of last resort.

The enactment of Section 77B provided a new method for settlement of debts with creditors. It allows this method to be availed of at any time during a pending bankruptcy proceeding. The decision of the Circuit Court holds that a referee is entitled to no compensation by way of commissions no matter how long the estate has been under his supervision when superseded by a petition under Section 77B.

If this is the law (and Sections 77B (i), 40-a and 40-c seem to me to be to the contrary), it would be a simple matter for any bankrupt, creditor or stockholder to deprive a referee, who has not been satisfactory to them, of fair compensation by the device of filing a petition under Section 77B.

It is against the public interest for a referee, as to his compensation, to be placed in the complete control and at the whim or fancy of a bankrupt, creditor or stockholder.

(2) The decision of the Circuit Court of Appeals construes Section 77B (i), a new statute which has never been construed by this Court. The clear intent of that section

to provide equitable and reasonable compensation for services rendered prior to the filing of Section 77B petition is nullified by this decision.

WHEREFORE, petitioner respectfully requests that a writ of certiorari be granted as prayed for.

THEODORE STITT,
Petitioner.

Dated, October 24, 1935.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The basis for allowance of part commissions as compensation to the referee is found in Sections 77B (i), 40-a and 40-c.

Section 77B Paragraph (i).

Section 77B (i) reads as follows:

> "If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, whether before or after this amendatory Act takes effect, a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section, and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee. * * *"

The intention of Congress to make both equitable and reasonable provision for services rendered prior to the 77B proceeding is clear. To deny the referee part commissions for services rendered for a period of ten months prior to the 77B petition would seem to make a nullity of this section.

The only limitation as to compensation under this section would seem to be by common sense inference that the allowance certainly should not be greater than that authorized

under Section 40. At the same time, it seems also to be apparent that the court could allow less than the compensation provided in Section 40 provided the amount authorized by that section should be considered more than equitable or reasonable.

Even the appellant in the Circuit Court of Appeals suggests that there is a hardship on the referee in denying him any commissions for ten months' services. At page 45 of its brief submitted to that court, the following appears:

> "Incidentally, the hardship, if any, in the instant case, is more apparent than real. The referee in the bankruptcy proceeding has been appointed as Special Master in the reorganization proceeding, and will undoubtedly become entitled to compensation for his services as such Special Master."

The contrary of the foregoing quotation is the fact. Upon the filing of the 77B petition, the referee was relieved of practically all responsibility, in that Oscar A. Lewis, Esq., was designated as Special Master in charge of the reorganization plan and, after its confirmation, was designated Special Master in charge of the consummation thereof. The referee was designated as Special Master on the filing of claims and bonds and his duties have been largely clerical.

Section 40-a.

Section 40-a reads as follows:

> "Referees shall receive as full compensation for their services, payable after they are rendered a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been ad-

ministered before them one per centum commissions on all money disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

It appears from the foregoing that referees are entitled to commissions in two events. If there is a liquidation of the estate, he is to receive one per cent on money disbursed to creditors by the trustee. If there is a composition, he is to receive one-half per cent on the amount to be paid to creditors upon confirmation. It is on the latter event that the referee based his application, although the Circuit Court of Appeals appears to have been under the impression that the referee was asking for commissions of one per cent on monies paid to creditors as in liquidation.

The word "composition" used in the statute is not restricted to a proceeding under Section 12 of the Bankruptcy Act. A reorganization has been held to be a composition.

Matter of O'Gara Coal Company, 260 Fed. 742.

Reorganization plan held not distinguishable in principle from composition in upholding constitutional validity of Sections 77 and 77B.

Continental v. *Chicago,* 294 U. S. 648, 55 Sup. Ct. Rep. 595;

In re Central (C. C. A. 2d) 75 F. (2d) 257;

Campbell v. *Allegheny* (C. C. A. 4th) 75 F. (2d) 947.

I have examined all of the reported decisions relating to Section 40. I find no case where commissions have been denied to a referee where there was a distribution to creditors either through liquidation or settlement except one. *In re Stillwell,* 12 F. (2d) 205. There the referee was guilty of misconduct.

Attention is called to the fact that resort to Section 77B was in the same bankruptcy proceeding as originally insti-

tuted. Although the corporation is now known as a debtor, there is still in effect an order of the District Court adjudicating the corporation a bankrupt. There was no change in the status of the estate when it passed to the process of reorganization under Section 77B except that the corporation became known as a debtor instead of a bankrupt. No part of the estate was disbursed or paid out to anyone when the 77B petition was filed and approved. The same bankrupt trustees were designated as debtor trustees and continued the administration of the estate including the conduct of the business of the corporation.

Section 40-c.

Section 40-c reads as follows:

> "In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee."

I find no reported decisions construing this section. It speaks for itself and says plainly that the referee is to have part commissions where the reference is revoked prior to a distribution either by dividend or compensation.

Section 72.

Section 72 reads as follows:

> "That neither the referee, receiver, marshal, nor the trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act."

This section is cited in the decision of the Circuit Court of Appeals as authority for denying the referee any com-

missions. The section is prohibitive as to any other or further compensation than that provided under Section 40-a. It does not take anything away from Section 40-a. Commissions are specifically provided for in Section 40-a. Commissions are plainly not "other or further compensation."

Inasmuch as the Circuit Court of Appeals reversed the orders providing for compensation by way of commissions, on the ground that there is no authority in law for any commissions, the question of the amount on which commissions are to be computed will not be discussed here. There is no finding that the amount allowed by the District Court was excessive or incorrectly computed. A discussion of the method of computation of commissions is in the referee's petition for rehearing (R. 424).

Conclusion.

Due regard for the integrity of bankruptcy administration by referees and every sense of fairness would seem to protest against a construction of the three sections referred to under which a referee is denied compensation for supervising the administration of the affairs of a $14,000,000 corporation, operating seven first-run motion picture theatres, for a period of ten months.

Leaving out of consideration the plight of the referee in this case, it would seem important that this Court should consider whether the compensation of referees is to be at the mercy of bankrupts, creditors or stockholders as a result of the decision herein.

The petition for writ of certiorari should be granted.

THEODORE STITT,
Petitioner.

Dated, Brooklyn, New York, October 24, 1935.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 540

THEODORE STITT,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER.

THEODORE STITT,
Pro se.

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SUPREME COURT OF THE UNITED STATES

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RECONSTRUCTION FINANCE CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER.

Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 79 F. (2d) 187 and is printed in the record (R. 287).

That part relating to the referee's compensation is as follows:

> "The award of $25,000 to the referee was clearly erroneous. We have already shown that the reorganization court was without power to increase allowances fixed by the prior court and that the prior court was limited by the provisions of the Bankruptcy Act. Under Section 40 (a) of that act referees are only entitled to 'a fee of fifteen dollars * * * in each case * * * and twenty-five cents for every proof of claim filed for allowance * * * and from estates which have been administered before them one per centum commission on all moneys disbursed to creditors by the trustee * * *.' Under Section 40 (a) the referee here was limited to a fee of $15 and his filing fees and under Section 72 could not 'in any form or guise * * * receive any other or further compensation.'"

Jurisdiction.

The order of the Circuit Court of Appeals was made July 29, 1935 (R. 295). Petition for rehearing was denied and mandate issued September 18, 1935 (R. 306). The petition for a writ of certiorari was filed October 24, 1935, and was granted December 9, 1935.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of Congress February 13, 1925 (U. S. Code, Title 28, Sec. 347).

Question Presented.

Whether a referee is entitled under Sections 77B (i), 40-a and 40-c of the Bankruptcy Act to receive equitable and reasonable compensation for services rendered by him from time of reference of bankruptcy proceeding to time of filing of petition under Section 77B.

Statement.

Petitioner appeals from order of the Circuit Court of Appeals for Second Circuit reversing order of District Court for Eastern District of New York fixing referee's compensation in the sum of $25,000.00. Petition for rehearing was denied.

In view of the addition of Section 77B to the Bankruptcy Act since the commencement of the bankruptcy proceeding, the new interpretation of Section 40 with reference to referee's commissions (*Realty Associates Securities Corporation* v. *O'Connor,* 295 U. S. 295), made since the referee's allowance was fixed by the District Judge, and confirmation of reorganization plan also since the allowance was made, I respectfully submit the following chronological statement:

August 8, 1933:

Allied Owners Corporation adjudicated bankrupt and referred to Referee Stitt. Estate administered for ten months thereafter under referee's supervision.

June 7, 1934:

Section 77B enacted.

June 22, 1934:

Allied Owners Corporation's petition under Section 77B filed and approved. Oscar A. Lewis, Esq., was designated as Special Master on the plan of reorganization, on consummation thereof after its confirmation, and on the adjudication of all large claims. Referee Stitt was designated as Special Master on filing of claims and countersignature of checks.

December 3, 1934:

Realty Associates Securities Corporation, C. C. A. 2nd Cir. 74 F. (2d) 61. Held, that referee's commissions should

be computed on face amount of bonds issued on composition.

March 5, 1935:

Referee filed petition for allowance (R. 188) in the sum of $25,000.00 for services rendered from August 8, 1933, to June 22, 1934, the date of the filing of 77B petition. This amount consisted of $23,977.00 commissions or 35⅖% of full commissions computed at ½% of total amount of undisputed claims and the sum of $1,023.00 for 4,092 claims filed at 25 cents per claim.

March 11, 1935:

Referee's application allowed in full by Judge Inch.

March 20, 1935:

Order to show cause signed by Judge Inch as to why referee's allowance should not be reduced on the application of Reconstruction Finance Corporation, a creditor.

April 29, 1935:

Realty Associates Securities Corporation v. *O'Connor*, 295 U. S. 295. Held, that referee's commissions should be computed on market value of bonds issued on composition.

May 13, 1935:

Order made by Judge Inch denying application of Reconstruction Finance Corporation to reduce referee's allowance (R. 270). Order based on opinion May 8, 1935 (R. 263).

June 13, 1935:

Allied Owners reorganization plan confirmed. No cash is being paid under the plan. Creditors are being paid in

full on the face amount of allowed claims by the issuance of new bonds with deferred maturity and reduced interest to first mortgage bondholders and debenture bondholders, by the issuance of third lien notes to creditors secured by third mortgage and unsecured creditors. Additional security for out-of-town theater mortgage bondholders (R. 298, 303).

Specifications of Error to be Urged.

The Circuit Court of Appeals erred:

(1) In holding that Referee was not entitled to compensation under Sections 77B (i), 40-a and 40-c for ten months' services except $15.00 filing fees and 25 cents for each claim.

(2) In holding that under Section 72 the referee is not entitled to part commissions.

(3) In failing to consider that part of Section 40-a upon which the referee's application for allowance was based together with Sections 77B (i) and 40-c.

Summary of Argument.

Under Section 77B (i) providing for equitable and reasonable compensation for services rendered before petition under Section 77B, the referee was properly allowed an apportioned part of composition commissions provided for under Section 40 (a) and 40 (c) based on the amount to be paid creditors under the 77B reorganization plan.

Equitable and reasonable compensation under Section 77B (i) is measured by and obviously should not exceed an apportioned part of the amount which would have been earned if the estate had been fully administered in the prior proceeding.

Reorganization plan is a composition and a portion of the one-half per cent commissions provided for in Section

40-a is the correct basis for arriving at equitable and reasonable compensation. Under Section 40-c, part commissions are to be paid when reference is revoked before conclusion.

Commissions were actually earned, the referee having rendered substantial services and carried heavy responsibility for ten months in supervising the administration of this estate.

The effect of the decision of the Circuit Court of Appeals is to deprive the referee of all compensation for these services solely by reason of the act of the debtor in filing a petition under Section 77B.

ARGUMENT.

The basis for allowance of part commissions as compensation to the referee is found in Sections 77B (i), 40-a and 40-c.

I.

Equitable and reasonable compensation under Section 77B (i) is measured by and obviously should not exceed an apportioned part of the amount which would have been earned if the estate had been fully administered in the prior proceeding.

Section 77B (i) reads as follows:

> "If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, whether before or after this amendatory act takes effect a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the

> judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee. * * *"

The intention of Congress to make both equitable and reasonable provision for services rendered prior to the 77B proceeding is clear. To deny the referee part commissions for services rendered for a period of ten months prior to the 77B petition, would seem to make a nullity of this section.

The only limitation as to compensation under this section would seem to be by common sense inference that the allowance certainly should not be greater than an apportioned part of that authorized under Section 40. At the same time, it seems also to be apparent that the court could allow less than the compensation provided in Section 40 provided the amount authorized by that section should be considered more than equitable or reasonable.

Even the appellant in the Circuit Court of Appeals suggests that there is a hardship on the referee in denying him any commissions for ten months' services. At page 45 of its brief submitted to that court, the following appears:

> "Incidentally, the hardship, if any, in the instant case, is more apparent than real. The referee in the bankruptcy proceeding has been appointed a Special Master in the reorganization proceeding, and will undoubtedly become entitled to compensation for his services as such Special Master."

The contrary of the foregoing quotation is the fact. Upon the filing of the 77B petition, the referee was relieved of practically all responsibility in that Oscar A. Lewis, Esq., was designated as Special Master in charge of the re-

organization plan and, after its confirmation, was designated Special Master in charge of the consummation thereof. The referee was designated as Special Master on the filing of claims and bonds and his duties have been largely clerical.

At page 9 of its brief in opposition to the granting of writ, respondent again points out that the referee has been appointed a special master under Section 77B.

II.

Reorganization plan is a composition and a portion of the one-half per cent commissions provided for in Section 40a is the correct basis for arriving at equitable and reasonable compensation. Under Section 40c, part commissions are to be paid when reference is revoked before conclusion.

Section 40-a reads as follows:

> "Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all money disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

It appears from the foregoing that referees are entitled to commissions in two events. If there is a liquidation of the estate, he is to receive one per cent on money disbursed to creditors by the trustee. If there is a composition, he is to receive one-half of one per cent on the amount to be paid to creditors upon confirmation. It is on the latter event that the referee based his application, although the Circuit

Court of Appeals appears to have been under the impression that the referee was asking for commissions of one per cent on monies paid to creditors as in a liquidation.

The word "composition" used in the statute is not restricted to a proceeding under Section 12 of the Bankruptcy Act. A reorganization has been held to be a composition. Matter of *O'Gara Coal Company,* 260 Fed. 742.

Reorganization plan held not distinguishable in principle from composition in upholding constitutional validity of Sections 77 and 77B. *Continental* v. *Chicago,* 294 U. S. 648, 55 S. Ct. 595; *in re Central* (C. C. A. 2d), 75 F. (2d) 257; *Campbell* v. *Allegheny* (C. C. A. 4th), 75 F. (2d) 947. General order XLVIII provides same commissions for referee under Section 74 extension proposal as on a composition.

I have examined all of the reported decisions relating to Section 40. I find no case where commissions have been denied to a referee where there was a distribution to creditors either through liquidation or settlement except one, *in re Stillwell,* 12 F. (2d) 205. There, the referee was guilty of misconduct.

Attention is called to the fact that resort to Section 77B was had at a time when the estate was being administered under the Bankruptcy Act. Although the corporation is now known as a debtor, there is still in effect, an order of the District Court adjudicating the corporation a bankrupt. There was no change in the size or condition of the estate when it passed to the process of reorganization under Section 77B except that the corporation became known as a debtor instead of a bankrupt. No part of the estate was disbursed or paid out to anyone at the time that the 77B petition was filed and approved. The same bankruptcy trustees were designated as debtor trustees and continued the administration of the estate including the conduct of the business of the corporation.

Section 40-c.

Section 40-c reads as follows:

> "In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee."

The effect of the approval of the 77B petition was to revoke the reference.

I find no reported decisions construing this section. It speaks for itself and says plainly that the referee is to have part commissions where the reference is revoked prior to a distribution either by dividend or composition.

Section 72.

Section 72 reads as follows:

> "That neither the referee, receiver, marshal, nor the trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act."

This section is cited in the decision of the Circuit Court of Appeals as authority for denying the referee any commissions. The section is prohibitive as to any other or further compensation than that provided under Section 40-a. It does not take anything away from Section 40-a. Commissions are specifically provided for in Section 40-a. Commissions are plainly not "other or further compensation."

Inasmuch as the Circuit Court of Appeals reversed the orders providing for compensation by way of commissions on the ground that there is no authority in law for any commissions, the question of the amount on which commissions are to be computed, will not be discussed here. There

is no finding that the amount allowed by the District Court was excessive or incorrectly computed. A discussion of the method of computation of commissions is in the referee's petition for rehearing (R. 296).

In re Le Bolt & Co., N. D. Illinois (unreported) (appendix), was followed by referee in computing his commissions.

III.

Commissions were actually earned, the referee having rendered substantial services and carried heavy responsibility for ten months in supervising the administration of this estate.

The effect of the decision of the Circuit Court of Appeals is to deprive the referee of all compensation for these services solely by reason of the act of the debtor in filing a petition under Section 77B.

The extent of the services rendered by the referee are indicated in his petition for allowance at (R. 190). Though referee's compensation is not on a basis of *quantum meruit*, for his own satisfaction, he wishes to have the record clear that he petitioned for compensation for work of importance actually rendered as an officer of the court in charge of a $14,000,000.00 corporation operating seven "first-run" motion pictures theaters.

The enactment of Section 77B provided a new method for settlement of debts with creditors. It allows this method to be availed of at any time during a pending bankruptcy proceeding. The decision of the Circuit Court of Appeals holds that a referee is entitled to no compensation by way of commissions no matter how long the estate has been under his supervision when superseded by a petition under Section 77B.

If this is the law (and Sections 77B (i), 40-a and 40-c seem to the contrary), it would be a simple matter for any bankrupt, creditor or stockholder to deprive a referee, who has not been satisfactory to them, of fair compensation by the device of filing a petition under Section 77B.

It is against the public interest for a referee, as to his compensation, to be placed in the complete control and at the whim or fancy of a bankrupt, creditor or stockholder.

The decision of the Circuit Court of Appeals construes Section 77B (i), a new statute which has never been construed by this Court. The clear intent of that section to provide equitable and reasonable compensation for services rendered prior to the filing of Section 77B petition is nullified by this decision.

Conclusion.

Petitioner has shown clear warrant of law in Sections 77B (i), 40-a and 40-c of the Bankruptcy Act for the compensation allowed by the District Court.

In denying compensation, the Circuit Court of Appeals failed to consider the basis in fact and in law relied upon in referee's petition.

The order of the Circuit Court of Appeals should be reversed.

Dated, Brooklyn, New York, December 31, 1935.

THEODORE STITT,
Petitioner.

APPENDIX.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS.

Referee's Report, 55997 Bankruptcy, 56413 Reorganization.

In re Lebolt & Co., Debtor.

On May 21, 1934, a voluntary petition in bankruptcy was filed by the bankrupt, and thereafter, on May 23, 1934, an order of adjudication was entered and the cause was generally referred to me as Referee in Bankruptcy. Various proceedings were had thereafter, including calling of first meeting of creditors and continuing same from time to time until the proceedings were suspended by the filing by the bankrupt of a petition under Sections 77-A and 77-B of the Bankruptcy Act. That petition was filed June 29, 1934, and the petition was approved as properly filed on June 30, 1934. On August 13, 1934, an order was entered generally referring the said proceedings under Section 77-B to me as Special Master.

Proceedings have been had pursuant to said reference which resulted in the entry by me as Special Master of an order, among other things, approving the plan of reorganization, which distributes to creditors approximately $480,000.

It is necessary that the compensation of the referee be fixed by your Honor in both cases. The order entered by me as Special Master in the proceedings under Section 77-B, which is No. 56,413 in this Court, suggests that the fair and reasonable compensation of the referee as Special Master in said 77-B proceeding is $1,200.67 and that $75.00 in addition represents the actual and necessary expenses of the referee as Special Master in connection with said reference in said cause.

Sub-section c of Section 40 of the Bankruptcy Act provides: "In the event of the reference of a case being revoked before it is concluded, * * *" the Judge shall determine what part of the fee and commissions shall be paid to the referee.

The filing of the petition by the bankrupt under Sections 77-A and B, and the approval of the petition as properly filed, caused the court to have exclusive jurisdiction of all the property of the bankrupt wherever located. That proceeding had the effect of revoking the order of reference in the bankruptcy case filed May 21, 1934.

In arriving at the amount of compensation that should be allowed to the referee in the bankruptcy proceeding and to the Special Master in the proceeding for relief under Sections 77-A and B, it was thought that it would be fair to the debtor corporation to consider the two proceedings as really one. In other words, it would not be fair to fix the compensation in one proceeding without regard to the compensation to be fixed in the other. Therefore, the result of the two proceedings is, in effect, a composition between the debtor and its creditors.

Sub-section a of Section 40 provides for the compensation to the referee in case of composition as "one-half of one per cent on the amount to be paid to creditors * * *." As the amount to be paid to creditors is approximately $480,000, and one-half of one per cent of the sum actually to be paid is $2,401.34, that is the amount which has been considered by me as fair and reasonable compensation for the referee's and special master's services in the two cases.

The method pursued finds support in the action of the Supreme Court in providing for compensation to the referee under Section 74 of the Bankruptcy Act which relates to relief of individuals. Section 74 provides for references to the referee. It was, however, silent as to compensation in the event an extension proposal was confirmed. To take care of that situation, the Supreme Court, pursuant to the Bankruptcy Act, promulgated General Order 48, which, among other things, provides (clause 4): "For the purposes of computing the commissions of the referee and of the custodian or receiver, the term 'composition' as used in Sections 40 and 48 of the act shall be deemed to include an extension proposal, and the amount of the debts whose maturity is to be extended thereunder and of the debts, if any, to be paid in full on the confirmation, shall be deemed

to be 'the amount to be paid creditors' within the meaning of said section."

Having reached the conclusion that said sum of $2,401.34 is the fair and reasonable compensation to the referee and Special Master in both proceedings, I have further considered the question as to what should be allowed in each of the proceedings, and I believe that, considering the amount and character of work done, that fair division is to divide it equally.

I therefore respectfully ask that your Honor fix the compensation of the referee in this proceeding at $1,200.67 and the actual and necessary expenses at $25.00, and in the proceedings under Section 77-B the compensation of the Special Master at $1,200.67 and the actual and necessary expenses at $75.00.

Dated September 20, 1934.

EDMUND D. ADCOCK,
Referee.

Report affirmed by District Judge, September 20, 1934.

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No. 540

In the Supreme Court of the United States

OCTOBER TERM, 1935

THEODORE STITT, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 540

THEODORE STITT, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 377–385) is not reported. The opinion of the Circuit Court of Appeals (R. 416–423) is reported in 79 F. (2d) 187.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 1, 1935 (R. 423). A petition for rehearing was denied and the order entered on September 18, 1935 (R. 434). The petition for a

writ of certiorari was filed October 24, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTION PRESENTED

Whether a referee in bankruptcy, in a bankruptcy proceeding that has been superseded by a Section 77B reorganization proceeding, is entitled to compensation by virtue of the provisions of Section 40 (a) of the Bankruptcy Act that allow referrees "one-half of 1 per centum on the amount to be paid to creditors upon the confirmation of a composition", in addition to the fees and commissions otherwise provided for in Section 40 (a).

STATUTES INVOLVED

The applicable statutes are set forth in the Appendix (*infra*, pp. 11–14).

STATEMENT

Review has been sought for another phase of the decision below (R. 415) by petition for a writ of certiorari in *Callaghan* v. *Reconstruction Finance Corporation*, No. 539, now pending before this Court.[1] The facts are set forth by respondent in its brief in opposition to that petition. Only the following additional facts need here be stated.

Allied Owners Corporation was referred to petitioner as a referee in bankruptcy on August 8, 1933

[1] The same record is used by petitioners in both cases.

(R. 141), until June 22, 1934, when the bankruptcy proceeding was superseded by a Section 77B reorganization proceeding (R. 3). His report, filed on March 2, 1935 (R. 287), included, without recommendation, his own application for an allowance of $25,000 as referee in bankruptcy (R. 288). The memorandum filed by the District Judge on March 8, 1935, without further hearing, included the allowance to petitioner (R. 305–306), as did also the orders of March 11, 1935, which respondent sought to vacate (R. 319–331). The District Court overruled respondent's objections (R. 377), and on May 13, 1935, entered an order accordingly (R. 386).

On appeal by respondent from these orders the Circuit Court of Appeals ruled, on July 22, 1935, that (R. 422)—

> The award of $25,000 to the referee was clearly erroneous. * * * Under Section 40 (a) of that act referee was only entitled to "a fee of fifteen dollars * * * in each case * * * and twenty-five cents for every proof of claim filed for allowance * * * and from estates which have been administered before them one per centum commission on all moneys disbursed to creditors by the trustee * * *."

Under this ruling, petitioner would be entitled to a total compensation of $1,038 (R. 270).

ARGUMENT

1. Petitioner does not appear to suggest the basis upon which his compensation should be computed. He quotes Section 77B (i) (Br., pp. 7–8) and states that "To deny the referee part commissions for the services * * * would seem to make a nullity of this section." But he goes on to say that under this section "allowance certainly should not be greater than that authorized under Section 40", and, further, that "the court could allow less than the compensation provided in Section 40 provided the amount authorized by that section should be considered more than equitable or reasonable." This theory seems in complete accord with the ruling of the court below (R. 422). Petitioner, therefore, relies only on a construction of Section 40 and does not assert that Section 77B [2] provides the maximum compensation to be allowed to him as a referee in bankruptcy.

Section 40 (a) provides:

> Referees shall receive as full compensation for their services, payable after they are rendered, a fee of $15 deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and 25 cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost

[2] That Section 77B (i) does not disturb existing restrictions on compensation has been shown by respondent in its brief in opposition in *Callaghan* v. *Reconstruction Finance Corporation*, No. 539, now pending before this Court.

> of administration, and from estates which have been administered before them 1 per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of 1 per centum on the amount to be paid to creditors upon the confirmation of a composition.

Petitioner urges that the "composition" referred to in this section includes proceedings under Section 77B. The cases cited by petitioner do not consider this question and we submit that the plain language of Section 40 (a) refutes his contentions. The portion of Section 40 (a) stressed by petitioner provides compensation for referees when composition under Section 12, made available in bankruptcy proceedings as the well recognized alternative to liquidation, comes into operation. Section 77B, on the other hand, is a more recent enactment that sets up proceedings totally unrelated to Section 12 and independent of all "prior" bankruptcy proceedings (Section 77B (k)), and has its own provisions for compensation (Section 77B (c)). Furthermore, since there are no referees in Section 77B proceedings, Section 40 (a) hardly could be applicable. Therefore, petitioner, to support his contentions, must argue that Congress enlarged by mere implication the customary meaning of Section 40 (a) and applied it to an independent proceeding in which it could never be used. The argument seems its own refutation. Indeed, Congress has

expressly declared in Section 72 of the Bankruptcy Act, that:

> Neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act.

A situation, substantially similar to the one here presented, was recently before this Court, in *Realty Corp.* v. *O'Connor,* 295 U. S. 295. A referee in proceedings under Section 12 referred to General Order XLVIII, which prescribes the compensation for referees in composition under Section 74. The Court stressed the independence from one another of the bankruptcy proceedings and the Section 74 proceedings, stating (p. 301):

> Section 74 (11 U. S. C. § 202) and the rules applicable thereto have relation to proceedings for the relief of a *debtor not a bankrupt* who seeks a composition or an extension of his debts. The present proceeding under § 12 of the act (11 U. S. C. § 30) is for a composition by a *bankrupt*. The general order was passed in the exercise of the rule-making power, and was directed to *proceedings of a particular class.* The jurisdiction that we now exercise is part of the judicial function, and is directed to *proceedings of a different class.* The one does not control the other. *Meek* v. *Centre County*

Banking Co., 268 U. S. 426, 434; *West Co.* v. *Lea*, 174 U. S. 599. (Italics supplied.)

Petitioner refers to Section 40 (c), which provides:

> In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

The plain language of this section entitles the referee merely to a legitimate portion of allowances proper under Section 40 (; it does not provide compensation not included within Section 40 (a).

It is not clear to respondent what petitioner means by stating that "resort to Section 77B was in the same bankruptcy proceeding as originally instituted" (Br., pp. 9–10). Subdivision (k) of that section provides that—

> None of the sections enumerated in this subdivision [including Section 40] shall apply to proceedings instituted under this section [77B] unless and until an order has been entered directing the trustee or trustees to liquidate the estate.

The debtor corporation is now under Section 77B and since no liquidation order has been entered Section 40 cannot apply. Therefore, petitioner is in the anomalous position of relying solely on Section 40, and at the same time arguing for a continuity of proceedings, which, by the terms of subdivision (k), excludes the application of Section 40.

Section 77B makes provision for costs of administration in proceedings thereunder. To calculate petitioner's maximum allowance for prior proceedings in a manner that assumes that the estate has been fully administered may well result, as in the District Court below, in an additional burden upon the insolvent estate. The brief in opposition in *Callaghan* v. *Reconstruction Finance Corporation*, No. 539, discusses (pp. 5–6) the universally recognized intent of Congress to reduce these costs, in the enactment of Section 72 and again of Section 77B.

Petitioner is a referee in bankruptcy and, as said in *Realty Corp.* v. *O'Connor, supra*, 299:

> Referees in bankruptcy are public officers (11 U. S. C. §§ 61, 64), and officers of a court. Like public officers generally, they must show clear warrant of law before compensation will be owing to them for the performance of their public duties. *United States* v. *Garlinger*, 169 U. S. 316, 321; *People ex rel. Rand* v. *Craig*, 231 N. Y. 216, 221.

We submit that he has not done so.

Petitioner states that the decision below places the compensation of referees "at the mercy of bankrupts, creditors, or stockholders" (Br., p. 11). The petitioner magnifies the effect that the compensation of referees has on the course of a debtor's estate through bankruptcy or 77B reorganization. Further, we submit that the decision below does not leave the compensation of referees at the mercy of others. For the time that an estate is in bank-

ruptcy the referee is entitled, as was pointed out by the court below, to certain fees (in this case aggregating $1,038) and to 1% on all moneys disbursed to creditors.[3] If 77B proceedings supersede the bankruptcy proceedings, the referee may well be appointed a Special Master, as was done in this case. If the 77B proceedings were ill-advised and an order for liquidation is entered pursuant to subdivision (k), referees may again be appointed and Section 40 becomes operative.

2. The issues in this case arise out of the construction of Section 40 of the Bankruptcy Act in its application to Section 77B, and they can arise again only when Section 77B proceedings are preceded by bankruptcy proceedings. When the present transitional period is passed, it is believed that only isolated reorganization proceedings will be preceded by bankruptcy proceedings.

CONCLUSION

The decision of the court below is correct, and is in accord with the principles announced by this Court in *Realty Corp.* v. *O'Connor, supra.* There is no conflict of decisions. The question presented is not one of general or continuing importance.

---

[3] Therefore, the court below did not, as suggested by petitioner (Br., p. 9) misinterpret the issue. Instead, it stated correctly the maximum compensation of referees in bankruptcy proceedings that are superseded by Section 77B reorganization proceedings.

It is therefore respectfully submitted that the petition should be denied.

STANLEY REED,
Solicitor General,
MAX O'RELL TRUITT,
Solicitor,
Reconstruction Finance Corporation.

Of Counsel:

JAMES B. ALLEY,
General Counsel, Reconstruction Finance Corporation.
ELI WHITNEY DEBEVOISE.

NOVEMBER 1935.

APPENDIX

NATIONAL BANKRUPTCY ACT AS AMENDED

SEC. 40 [11 U. S. C. (1934 ed.), Sec. 68] (a) Referees shall receive as full compensation for their services, payable after they are rendered, a fee of $15 deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and 25 cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them 1 per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of 1 per centum on the amount to be paid to creditors upon the confirmation of a composition.

(b) Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

(c) In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

SEC. 72. [11 U. S. C. (1934 ed.), Sec. 112] Neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation

for his services than that expressly authorized and prescribed in this title.

SECTION 77B.—

(i) [11 U. S. C. (1934 ed.), Sec. 207 (i)] If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, whether before or after June 7, 1934, at 12 o'clock noon a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors, as provided in subdivision (a) of this section, and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee. If a receiver or trustee has been appointed by a Federal or State or Territorial court prior to the institution of a proceeding under this section, and such proceeding shall be dismissed under subdivision (c), clause (8), of this section, the judge may include in the order of dismissal appropriate orders directing the trustee or trustees, or the debtor if no trustee is appointed, to transfer possession of the debtor's property within the territorial jurisdiction of such court to the receiver or prior trustee so appointed, upon such terms as the judge may deem equitable for the protection of obligations incurred by any trustee or trustees appointed under

this section, and for the payment of administrative expenses and allowances in the proceeding hereunder. For the purposes of this section the words "Federal court" shall include the district courts of the United States and of the Territories and possessions to which this section and section 206 of this title are or may hereafter be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska, and the District Court of the United States for the Territory of Hawaii.

(k) [11 U. S. C. (1934 ed.), Sec. 207 (k)] If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section: (1) The case may be referred to a referee as provided in section 45 of this title, who shall be compensated as provided in section 68 of this title; (2) the first meeting of creditors shall be held as provided in section 91 of this title, upon notice as provided in section 94 of this title; (3) a trustee or trustees shall be appointed as provided in section 72 of this title, and be compensated as provided in section 76 of this title; (4) claims which are provable under section 103 of this title may be proved as provided in section 93 of this title, except that the time within which proof may be made shall not expire until six months after the date of the last publication of the notice of the first meeting; (5) debts shall be entitled to priority as provided in section 104 of this title; (6) sales shall be made as provided in subdivision (b) of section 110 of this title; (7) dividends may be declared and paid as provided in section 105 of this title. None of the sections enumerated in this subdivision (k), except subdivi-

sions (g), (i), (j), and (m) of section 93 of this title, and subdivisions (a) and (e) of section 110 of this title, shall apply to proceedings instituted under this section unless and until an order has been entered directing the trustee or trustees to liquidate the estate. All other provisions of this title, except such as are inconsistent with the provisions of this section, shall apply to proceedings institute under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors"; "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequences and effect as an order of adjudication.

SECTION 3 OF THE ACT OF JUNE 7, 1934, C. 424, 48 STAT. 923 (11 U. S. C. (1934 ED.), SEC. 76A)—

* * * The compensation allowed a receiver or trustee or an attorney for a receiver or trustee shall in no case be excessive or exorbitant, and the court in fixing such compensation shall have in mind the conservation and preservation of the estate of the bankrupt and the interests of the creditors therein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 540.

THEODORE STITT,

Petitioner,

against

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RECONSTRUCTION FINANCE CORPORATION, RESPONDENT.

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IN THE

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

Introductory.

This case relates to the compensation of a referee in bankruptcy (the petitioner) for acting as referee in a bankruptcy proceeding which was terminated and superseded by a reorganization proceeding under Section 77B of the Bankruptcy Act.*

The District Court for the Eastern District of New York entered two orders (R. 219, 220-221), one allowing the petitioner, an official referee in bankruptcy, as referee in the

* A companion case, *Callaghan* v. *Reconstruction Finance Corporation*, No. 539, involves the compensation of the trustees in bankruptcy for their services in the same bankruptcy proceeding.

bankruptcy proceeding, the amount of $25,000 for acting in that proceeding during a ten-month period, and the other directing the trustees in the reorganization proceeding to pay him that amount. An application in both proceedings by respondent Reconstruction Finance Corporation to vacate and set aside the orders and to revise the allowance to the petitioner (as well as certain other allowances) was denied by the District Court in a third order (R. 270-271).

On appeal by the respondent from all three orders, the Circuit Court of Appeals reversed the District Court, holding that the award of $25,000 to the Referee was "clearly erroneous". That portion of the opinion of the Circuit Court relating directly to the Referee's compensation is as follows (R. 294):

> "The award of $25,000 to the referee was clearly erroneous. We have already shown that the reorganization court was without power to increase allowances fixed by the prior court and that the prior court was limited by the provisions of the Bankruptcy Act. Under Section 40 (a) of that act referees are only entitled to 'a fee of fifteen dollars * * * in each case * * * * and twenty five cents for every proof of claim filed for allowance * * * and from estates which have been administered before them one per centum commission on all moneys disbursed to creditors by the trustee * * *'. Under Section 40 (a) the referee here was limited to a fee of $15 and his filing fees and under Section 72 could not 'in any form or guise * * * receive any other or further compensation'."

The referee's filing fee and commissions on claims filed amount together in this case to $1,038.

The referee's petition for rehearing (R. 296-305) in the Circuit Court of Appeals was denied (R. 306). This Court on December 9, 1935, granted a writ of certiorari.

Opinions Below.

The opinions of the District Court are not reported but are printed in the Record (R. 216-217, 263-269). The opinion

of the Circuit Court of Appeals is reported in 79 F. (2d) 187 and appears at R. 287-295.

Jurisdiction.

The opinion of the Circuit Court of Appeals was rendered on July 22, 1935, the order for the mandate thereon was entered on July 29, 1935, and the mandate was filed on September 18, 1935.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended (U. S. C. Title 28, Sec. 347a).

Statement of the Case.

On August 8, 1933, Allied Owners Corporation was adjudicated a bankrupt and referred to the petitioner herein as referee in bankruptcy (R. 102, 188). On June 22, 1934, the bankruptcy proceeding was superseded by a proceeding for reorganization under Section 77B of the Bankruptcy Act (R. 188).

The services of the petitioner as referee in bankruptcy involved in this case were, therefore, performed in the period from August 8, 1933, to June 22, 1934, and are set forth in his petition for allowance (R. 188-203). An examination of the transcript from the referee's "Docket Book" (R. 192-203) shows that few hearings were held and few controverted motions were considered.

On July 27, 1934, the District Court entered an order in the reorganization proceeding, referring certain matters to the petitioner herein as a special master and certain other matters to another as special master (R. 189). The consideration of the reorganization plan which was later proposed in the reorganization proceeding was referred to the other special master and not to the petitioner.

More than seven months after the bankruptcy proceeding was superseded, applications for allowances for services in that proceeding were filed by the trustees in bankruptcy, their counsel, the attorney for the bankrupt and others and on February 4, 1935, the petitioner as referee in bankruptcy gave

notice of a hearing in the bankruptcy proceeding to consider such applications, as well as his own application for $25,000 (R. 187-188).

On March 5, 1935, the referee filed his report in the bankruptcy proceeding (R. 203-216) recommending allowances aggregating $147,000 for the applicants other than himself (the amounts so recommended being subsequently reduced by the Circuit Court of Appeals to an aggregate of $69,628.50) and transmitted "without comment and without recommendation" (R. 204) his own petition applying for $25,000.

On March 11, 1935, Judge Inch entered an order (R. 219) allowing the petitioner $25,000 for his ten months' services as referee in bankruptcy and another order in the reorganization proceeding (R. 220-221) directing the payment of that allowance.

On March 20, 1935, on the petition of the respondent (R. 225-233), Judge Inch signed an order (R. 222-224) directing the petitioner (and others to whose allowances objections were taken) to show cause why the orders of March 11, 1935 should not be vacated and set aside and the allowances reduced to legal and reasonable amounts. After a hearing, Judge Inch filed an opinion (R. 263-269) deciding against the respondent. On May 13, 1935, he entered an order (R. 270-271) denying its motion.

On appeal of the respondent from the orders of March 11, 1935 and the order of May 13, 1935, the Circuit Court of Appeals held, in an opinion (R. 287-295) by Judge Augustus N. Hand, that Section 40 of the Bankruptcy Act is applicable to and fixes the measure of compensation of a referee in bankruptcy for services in a bankruptcy proceeding, that a supervening proceeding under Section 77B does not remove such limitations, and that under Section 40, no cash having been disbursed to creditors, the referee was limited to his filing fee and commission on claims filed, together amounting to $1,038.

It was not until June 13, 1935, almost a full year after the proceeding under Section 77B had been begun and three months after the referee's petition for allowances had been filed, that a plan of reorganization of Allied Owners Corpora-

tion was confirmed in the Section 77B proceeding. That plan has not yet been consummated.

Questions Presented.

Whether a proceeding in reorganization instituted under Section 77B of the Bankruptcy Act which supersedes a prior bankruptcy proceeding, or a plan of reorganization confirmed in the Section 77B proceeding, constitutes a "composition" in the prior bankruptcy proceeding within the meaning of Section 40 (a) relating to compensation of referees in bankruptcy for bankruptcy services.

Whether, when a bankruptcy proceeding is superseded by a reorganization proceeding under Section 77B, the referee in the bankruptcy proceeding, although not entitled under Section 40 (a) to any allowance except statutory fees, is nevertheless entitled to additional compensation by virtue of Section 40 (c) of the Bankruptcy Act which provides that, when a reference is revoked before its conclusion, the judge shall determine what "part of the fee and commissions" shall be paid to the referee.

Summary of Argument.

The referee in bankruptcy is a public officer and his compensation is fixed by statute. Section 40 of the Bankruptcy Act fixes the compensation of referees for bankruptcy services. Under Section 40 (a) of the Bankruptcy Act, the lower court allowed the referee $1,038, being the fee of $15 plus twenty-five cents for each claim filed in the bankruptcy proceeding. As no moneys were disbursed to creditors during the bankruptcy proceeding and no composition was ever proposed, much less confirmed, in that proceeding, the lower court properly allowed no further compensation under Section 40 (a).

In view of the concession by the referee that Section 40 is applicable to his compensation for services in the bankruptcy proceeding, it is unnecessary in this case to deal with

the principal contention raised by the petitioners in the companion case of *Callaghan* v. *Reconstruction Finance Corporation*, No. 539, argued herewith. In that case the petitioners contend that Section 77B (i) removes limitations placed by Section 48 upon compensation allowed in a prior bankruptcy proceeding to trustees in bankruptcy. The referee in this case does not raise the analogous contention that Section 77B (i) removes the limitations of Section 40. On this point, therefore, we respectfully refer the Court to Point I of our brief in the *Callaghan* case.

The referee contends that the institution of the reorganization proceeding under Section 77B, or possibly the confirmation of a plan of reorganization* in that proceeding, is a composition in a bankruptcy proceeding within the meaning of Section 40 (a).

The bankruptcy proceeding and the proceeding under Section 77B are entirely independent and separate proceedings. Each has its own provisions for the compensation of its own officers. The word "composition", as used in Section 40 (a), refers to a composition provided for by Section 12 of the Bankruptcy Act, which of course must take place in a bankruptcy proceeding.

The contention of the petitioner that Section 40 (c) entitles him to a portion of a fee and commissions has no merit. The "fee and commissions" referred to in Section 40 (c) are obviously those referred to in subdivision (a) of the same Section. The revoking of a reference does not entitle a referee to a fee and commissions unless a fee and commissions are eventually payable in the same bankruptcy proceeding under the provisions of Section 40 (a).

Moreover, it does not appear that the reference to the petitioner has been revoked. More than seven months after the proceeding under Section 77B was commenced, he acted as

---

* The plan of reorganization in the proceeding under Section 77B was not confirmed until almost twelve months after the bankruptcy proceeding was superseded and three months after the referee's petition for allowance in the bankruptcy proceeding was filed.

referee in the prior bankruptcy proceeding on the question of allowances to the trustees in bankruptcy and others for services in that proceeding.

If by any chance this Court should hold that Section 77B (i) removes the limitations imposed by statute on the compensation fixed by a court in a prior proceeding for its own officers, it is submitted that the amount of $25,000 as compensation to the petitioner for his services is grossly excessive and exorbitant and that this Court should either determine itself what would constitute a reasonable amount or remand the matter to the Circuit Court of Appeals for its determination in accordance with standards prescribed by this Court.

ARGUMENT.

POINT I.

The lower court rightly held that no commissions (beyond statutory fees) were payable to the referee in bankruptcy under Section 40 of the Bankruptcy Act, since in the bankruptcy proceeding no moneys had been disbursed to creditors and no composition had been confirmed.

The referee in bankruptcy is a public officer and his compensation is fixed and limited by statute.

In *Realty Associates Securities Corporation* v. *O'Connor*, 295 U. S. 295, at page 299, this Court stated:

> "Referees in bankruptcy are public officers (11 U. S. C., §§ 61, 64), and officers of a court. Like public officers generally, they must show clear warrant of law before compensation will be owing to them for the performance of their public duties. * * * Extravagant costs of administration in the winding up of estates in bankruptcy have been denounced as crying evils. * * * In response to those complaints, Congress has attempted in

the enactment of the present statute to fix a limit for expenses growing out of the services of referees and receivers. Bankruptcy Act, §§ 40, 48 (d), (e), as amended, 11 U. S. C., §§ 68, 76. The pay for referees is no longer involved in uncertainty as to the applicable percentage."

Section 40 of the Bankruptcy Act fixes the compensation allowable to referees and gives the court no discretion. Section 40 (a) reads as follows:

> "Referees shall receive as full compensation for their services * * * a fee of fifteen dollars * * * in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."*

The Bankruptcy Act contemplates that referees shall serve in many cases. Referees may often have to handle estates with little or no assets, and the language quoted from Section 40 contemplates that the fees for proofs of claim are to be "paid from the estate, if any". On the other hand, in cases where large amounts of cash are disbursed to creditors, the referee may receive compensation far beyond any actual value of his services. The bankruptcy court has no power whatsoever to restrict the amount of that large commission, if it falls within the provisions of Section 40 (a).

Similarly the bankruptcy court cannot allow compensation except as provided by Section 40 (a). That Section provides for the payment of commissions (as distinguished from fees which were allowed by the court below) only "from estates which have been administered" before the referee, and only (1) on moneys disbursed to creditors or (2)

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* For the full text of Section 40 (a), see Appendix, page 22, *infra*.

on the amount to be paid to creditors upon the confirmation of a composition.

In the instant case, the bankrupt estate was not completely administered before the referee. No moneys whatsoever were disbursed to creditors. No composition was confirmed in the bankruptcy proceeding. It is submitted that the Circuit Court of Appeals in denying to the referee any compensation beyond his statutory fees of $1,038 only applied the plain language of Section 40 (a).

A.

Neither a superseding proceeding for reorganization under Section 77B of the Bankruptcy Act nor the subsequent confirmation of a reorganization plan in such proceeding constitute a confirmation of a composition within the meaning of Section 40 in fixing compensation in a prior bankruptcy proceeding.

The referee apparently admits that Section 40 (a) is applicable to his compensation in this case (Br. pp. 7-9). He is suggesting, however, that he is entitled to commissions on the ground that there has been a confirmation of a composition within the meaning of that Section (Br. pp. 8-9). His contention apparently is that either the reorganization proceeding, or perhaps the reorganization plan (not confirmed in this case until three months after his petition for allowance had been filed), amounted to a composition.

But it is clear that the "composition" referred to in Section 40 (a) does not include either a superseding proceeding under Section 77B or a reorganization plan subsequently confirmed in such 77B proceeding. Section 12* of the Bankruptcy Act (which, like Section 40, has been part of the statute for many years) deals at length with compositions in bankruptcy proceedings and with the method of confirming such compositions. The words "the confirmation of a composition," in Section 40 (a) unquestionably refer to a composition and a confirmation thereof provided for by Section 12 and clearly

* For the text of Section 12, see Appendix, pages 21-22, *infra*.

have no application to something done in an entirely independent proceeding.

In support of his contention that the term "composition" in Section 40 (a) may include an independent reorganization proceeding under Section 77B or a plan confirmed in such a proceeding, the referee cites only four cases, none of which is in point. Thus, three of the cases cited by him (*Continental Illinois National Bank* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648; *In re Central Funding Corp.*, 75 F. (2d) 256; *Campbell* v. *Alleghany Corporation*, 75 F. (2d) 947), are referred to only for their discussion of the constitutionality of Sections 77 or 77B. Their constitutionality was under attack on the ground that those Sections, which require no adjudication of bankruptcy, were not a proper exercise of the Congressional power to make laws on the subject of bankruptcies. In each the court merely said that the same objection could be made to the power of Congress with respect to compositions—a power the existence of which was no longer in doubt. In none of those cases was the construction of Section 40 (a), or the precise meaning of the term "composition" as used in the Bankruptcy Act, involved in any way.

The only other case cited by the referee on this point is *In re O'Gara Coal Company*, 260 Fed. 742 (7th Circuit, 1919). There the court held that a so-called plan of reorganization which had been approved by a majority of the creditors, by the bankrupt and by the court in a bankruptcy proceeding was a composition, confirmation of which would discharge the bankrupt under the provisions of Section 14 (c) of the Bankruptcy Act, and that the order confirming the composition was, therefore, reviewable by appeal. It is to be noted that if the plan had not been a composition within the meaning of Section 12 the court would have had no power whatsoever to put it into effect. The case does not even tend to show that reorganizations effected otherwise than by means of a composition under Section 12 are compositions within the meaning of Section 40 (a). It did not involve

a reorganization plan confirmed in an entirely separate proceeding, for the reorganization plan in question had been approved in the bankruptcy proceeding.

As in *Realty Associates Securities Corporation* v. *O'Connor, supra,* the referee here also "invokes the analogy of General Order XLVIII (4), adopted April 24, 1933 (288 U. S. 636, 637) which fixes the compensation of referees in proceedings under § 74 of the Bankruptcy Act." He states that that Order provides the same commissions for a referee acting in proceedings for the relief of a debtor under that section that are applicable in ordinary bankruptcy proceedings in the case of a composition (Br. p. 9).

Section 74 specifically provides for referees but provides no measure of compensation. This Court, in the exercise of its rule-making power provided that for the purpose of computing commissions of referees acting under Section 74, the term "composition", as used in Section 40 should include an extension proposal, etc. The argument that it had by adopting the General Order construed the language of Section 40 (a) as applied to ordinary bankruptcy proceedings, was definitely rejected by this Court. *Realty Associates Securities Corporation* v. *O'Connor, supra,* pp. 300-301. The further statement by this Court in that case (p. 301) that an ordinary bankruptcy proceeding and a proceeding under Section 74 of the Bankruptcy Act relating to relief of debtors are "of a different class" is clearly applicable to the difference between ordinary bankruptcy proceedings and proceedings under Section 77B.

B.

Section 40 (c) of the Bankruptcy Act authorizes the judge merely to determine what part of the fee and commissions payable under Section 40 (a) shall be paid to a referee whose reference is revoked and gives no power to allow compensation where no compensation is payable under Section 40 (a).

The referee, after arguing that Section 40 (a) is applicable and that the reorganization plan (or possibly the reorganiza-

tion proceeding) constitutes a composition within the meaning of that Section, attempts to rely also upon the provisions of Section 40 (c) (Br. pp. 8-11). Section 40 (c) merely provides that when a reference is revoked before it is concluded, "the judge shall determine what part of *the fee and commissions* shall be paid to the referee."* The revoking of a reference obviously cannot entitle the referee to a part of "the fee and commissions", unless eventually payable in the same bankruptcy proceeding under the provisions of Section 40 (a).

Reading Section 40 as a whole, it is clear that Section 40 (a) was intended to provide the measure of compensation and to establish the conditions under which it is payable. Sections 40 (b) and 40 (c) merely provide a means of allocating the compensation payable under Section 40 (a) when the conditions for its payment have been fulfilled, but when the particular referee has not earned it entirely. Here the conditions of payment of commissions set forth in Section 40 (a) have not been fulfilled and there is no compensation to allocate, except the $1,038 in fees allowed in full to the referee.

Certainly the words "the fee and commissions" cannot refer to any fee or commission allowed in an entirely separate proceeding over which the "judge" who, by the terms of Section 40 (c), is to "determine what part the referee shall receive", has no control. The bankruptcy proceeding and the proceeding under Section 77B are entirely independent and separate proceedings. Each has its own provisions for the compensation of its own officers. Section 40 admittedly applies to referees in bankruptcy proceedings and Section 77B, which does not provide for referees, has in subdivision (c), clause (11),* an express provision for compensation of special masters. Thus Section 40 provides for compensation for referees in bankruptcy computed, not on a *quantum meruit* basis, but by the application of a mathematical formula, whereas Section 77B (c) provides for "reasonable" compensation for

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* For the full text of Section 40 (c), see Appendix, page 22, *infra*.

the special masters who may be appointed in reorganization proceedings. That the two proceedings are independent and separate is recognized by many provisions in Section 77B, including particularly the provisions of subdivision (i),* which refers to "allowances in the prior proceeding as may be fixed by the court" in that proceeding.

Moreover, it seems impossible that Section 40 (c), dealing with revocation of a reference, could in any event have any application in this case. Technically, of course, there has been no revocation of the reference here†; the order of adjudication in bankruptcy which includes the reference was not revoked by the institution of the 77B proceeding; as is evidenced by the fact that here the referee acted in the bankruptcy proceeding on the question of allowances seven months after the institution of the 77B proceeding. More important than such a technical consideration, however, is the fact that even if the reference is to be considered as no longer in effect, that result follows not from its revocation but from the termination of the bankruptcy proceeding. Section 40 (c) clearly was not intended to deal with the event of termination of the proceeding. Termination of bankruptcy proceedings in other ways has not been thought to entitle a referee to commissions. See, for example,

In re Detroit Mortgage Corporation, 12 F. (2d) 889; certiorari denied 273 U. S. 713.

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* For the full text of Section 77B, subdivision (i), see Appendix, page 23, *infra*.

† On the question of revocation, the referee places some reliance on the report of another referee in *In re Le Bolt & Co., Debtor* (printed in the petitioner's brief pp. 13-15) in which a referee apparently passed on his own application for fees both in a bankruptcy proceeding and a superseding reorganization proceeding. There the same referee acted throughout both proceedings, as referee in the former and special master in the latter, and, measuring his compensation under Section 40 (a), divided it between the two proceedings. There is nothing to show either that any objections were raised or that the entire amount awarded was not reasonable compensation for services in the reorganization proceeding alone. There also a referee "invoked the analogy" of General Order XLVIII (4) which is applicable to proceedings under Section 74, an analogy which this Court rejected in a similar situation. *Realty Associates Securities Corporation* v. *O'Connor*, *supra*, at pages 300-301. See this brief, page 11, *supra*.

C.

The fact that some services have been performed furnishes no basis for compensation unless the conditions of Section 40 exist; supposed hardship is disregarded.

With regard to the statement of the referee that "commissions were actually earned"* (Br. p. 11), it is obvious that under Section 40 commissions are payable whether or not "earned" and depend merely upon the fact of reference and the making of payments to creditors. The referee points out that referees' compensation is not on a basis of *quantum meruit* (Br. p. 11). Indeed it would be almost as difficult to value the services of a referee on that basis as to value the services of a judge. Unlike a trustee in bankruptcy, the referee does not have to use initiative or assume responsibility in the administering of an estate, other than, for the most part, to pass on those matters which are brought before him.

Referees in bankruptcy handle cases of all kinds. In cases of small estates or estates where little cash is disbursed to creditors and there is no composition, referees may receive little, if any, compensation. On the other hand, where large amounts of cash are disbursed to creditors, the referee may receive compensation far beyond any actual value of his services.

All references which are terminated do not create fees for referees, no matter how much work they may have done. For example, a petition in bankruptcy may be dismissed after reference and in that case no compensation can be paid unless moneys had been disbursed to the creditors by the trustee.

See

In re Detroit Mortgage Corporation, 12 F. (2d) 889; certiorari denied, 273 U. S. 713.

See also *American Surety Company* v. *Freed*, 224 Fed. 333.

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* As pointed out in the statement of the case, the referee has been allowed $1038 as compensation under Section 40 (a), under the decision of the court below.

In re Morris Bros., 8 F. (2d) 629, in which the Court stated at page 630:

> "Unless, therefore, the law authorizes the payment of commission on property turned over by the referee to the claimants, such compensation cannot be allowed, however meritorious. It seems to me that the statute is plain and unambiguous. The commissions of the referee are to be computed on '*moneys* disbursed to creditors,' and that of the trustee 'on *moneys* disbursed or turned over to any persons including the lienholders.' In each case, it is the moneys disbursed or turned over, and not property, that forms the basis for such allowance. It may be that this will work a hardship in some cases, and perhaps in the instant case; but that affords no reason why the law as written should not be observed." (Italics are the Court's.)

See also *In re Curtis*, 100 Fed. 784, where the Court said at page 792:

> "*The present act*, so far as it specifies the amount of fees of officers whose services may be required in execution of the law, *fixes them at a low figure, possibly much lower than is compensation for the service; but it is not for us, for that reason, to disregard the law, or seek to thwart the design of congress, however inadequate we may think the compensation allowed.*" (Italics ours.)

The rule established by the court below would permit a referee to receive commissions for services in a superseded bankruptcy proceeding if dividends had been paid to creditors. In other words, that court applied Section 40 (a).

The statement by the referee that a bankrupt creditor or stockholder could under this ruling "deprive a referee, who has not been satisfactory to them, of fair compensation by the device of filing a petition under Section 77B" hardly needs answering. It is inconceivable that the decision as to whether a corporation can be reorganized and whether Section 77B proceedings are desirable would be made to depend on whether a referee in bankruptcy had been "satisfactory".

D.

Nothing in Section 77B (i) affects the applicability or the construction of Section 40 set forth above.

Even though the referee concedes that Section 40 is applicable to his compensation for bankruptcy services, he also quotes Section 77B (i) (Br. pp. 7-8) and states that "To deny the referee part commissions for services * * * would seem to make a nullity of this section." It is difficult to understand the effect which he attempts to attribute to Section 77B (i), which expressly provides that the court in the prior proceeding is to fix allowances for its officers. After stating that Congress intended to make "both equitable and reasonable provision for services rendered prior to the 77B proceeding", he goes on to say that under that Section "the allowance certainly should not be greater than an apportioned part of that *authorized* under Section 40." (Italics ours.)

Nothing in subdivision (i) of Section 77B refers in terms to Section 40 of the Bankruptcy Act or suggests the removal of any restriction imposed by that section upon the prior court in determining allowances or suggests any change in the construction by that court of the provisions of that Section.

That Section 77B (i) does not in any manner amend, modify or repeal, either directly or by implication, the specific provisions of Section 48 has been fully covered in Point I, pages 15-19, of our brief in *Callaghan* v. *Reconstruction Finance Corporation*, argued herewith, and we respectfully refer to that brief as an answer to any contention that the referee may have intended in his brief with respect to any claimed effect of Section 77B (i) on Section 40.

It is submitted that the petitioner, a public officer, has not shown "clear warrant of law" entitling him to the compensation allowed by the District Court. Compensation must be based upon the Bankruptcy Act, and under that Act the Court shall not allow a referee "any other or further com-

pensation for his services than that expressly authorized and prescribed in this act."

Bankruptcy Act §72; U. S. Code, Title 11, § 112.
Realty Associates Securities Corporation v. *O'Connor*, *supra*, at p. 299.

POINT II.

If Section 40 should be held inapplicable, the allowance of $25,000 to the referee by the District Court was unreasonable, excessive and exorbitant, and this Court, it is submitted, should either fix the reasonable compensation of petitioner or remand the question to the Circuit Court of Appeals laying down standards for its guidance.

Though the referee admits that Section 40 applies to his compensation, a contrary contention is being made in the analogous situation* involving the compensation of trustees in bankruptcy that the limitations imposed by Section 48 of the Bankruptcy Act are not applicable. We submit that the court below and the petitioner and respondent in this case are correct in their position that Section 40 is applicable. If this Court should, however, hold that Section 40 is inapplicable and that the referee's compensation is to be fixed otherwise than as prescribed by that section, it may properly and should, we submit, determine the amount constituting reasonable compensation for the petitioner's services in the bankruptcy proceeding or remand the matter to the Circuit Court of Appeals for determination, laying down such rules or standards as may be necessary. In this connection, it must be determined whether the amount of $1,038 already

* *Callaghan* v. *Reconstruction Finance Corporation*, No. 539, argued herewith.

allowed as filing fee and commissions under Section 40 is reasonable compensation.*

As pointed out above, it would be almost as difficult to value the services of a referee on a *quantum meruit* basis as to value the services of a judge. His acts are for the most part judicial in character. It is true that he has certain supervisory administrative functions, such as the countersigning of checks. He is not required to exercise initiative in administration.

It is undoubtedly for this reason that Congress in Section 40 *fixed* the measure of the referee's compensation for ordinary bankruptcy proceedings and did not, as in the case of trustees, provide merely a *maximum* within which reasonable compensation was to be allowed.

The transcript from the referee's docket book (R. 192-203) indicates that the following were his principal services:

> Hearing on and disapproval of Mr. Greve's election as trustee and allowance of petition for review (R. 192, 193). (On review the District Court reversed the referee's order (R. 193).)
>
> Signing uncontested or *ex parte* orders which permitted the trustees to retain a management corporation previously engaged by the bankrupt to manage an office building (R. 193); authorized the trustees to continue business (three orders) (R. 193, 195, 200); fixed the time for tax authorities to file claims (R. 195); permitted an advance to a corporation operating a theatre owned by the bankrupt under contract (R. 197-198); and permitted payment of taxes on three parcels of real estate (two orders) (R. 199, 200).
>
> Hearing and determination of the following controverted matters: Removal proceedings against Mr. Greve (R. 194); restraining paying agent from paying interest

* Obviously if Section 40 does not apply the automatic payment of filing fee and commissions cannot be made under that Section; the referee's compensation must be determined as a whole, and it will be necessary to determine whether the $1,038 was adequate and reasonable for the services performed.

(R. 196, 197); segregation of rents by Realty Associates, Inc., (R. 196, 197); modification of stay against foreclosure by trustee under a mortgage of the bankrupt (R. 198).

Presiding over examinations under Section 21 (a) (the minutes covering 1280 pages).

Denial of trustee's petition to invest cash and securities (R. 195).

Mailing of notices (R. 192, 196, 198).

The items mentioned are those which occurred prior to June 22, 1934, the date on which the bankruptcy proceeding *was superseded.* The docket entries in the record, however, include entries to and including November 3, 1934. Such later entries clearly cannot be taken into account.

The referee's own summary of his services (R. 190) is as follows:

> "Meetings, hearings and examinations were held before me on forty-eight occasions, seventeen orders were signed, five reports were filed by the Trustees, six decisions in writing and Certificates were made by me. The business of the bankrupt has been conducted by the Trustees under orders made by me. All checks have been countersigned by me. The number of claims filed is 4,092."

To state that such services are worth $25,000 is to state an absurdity. An examination of the transcript of the referee's docket entries (R. 192-203) discloses the exceedingly small amount of time which the referee actually must have spent on the matter during the ten months' period. A referee in bankruptcy is a public officer and if it should be held that Section 40 is inapplicable to his compensation in the instant case, the determination of his compensation should bear some reasonable relation to the character, scope and importance of his services and the amount of time involved.

The strong congressional intent and public policy against allowing excessive costs of administration is directly applicable in determining compensation in this case. For a fuller discussion on this point we respectfully refer this Court to

pages 29-32 in our brief in the companion case of *Callaghan* v. *Reconstruction Finance Corporation*, No. 539, argued herewith.

CONCLUSION.

It is respectfully submitted that the construction of Section 40 and Section 77B by the Circuit Court of Appeals was correct and its order should be affirmed. If, by any chance, this Court should otherwise construe the effect of Section 77B, it is submitted that this Court should either determine itself what would be reasonable compensation for the referee for his bankruptcy services or should remand the question to the Circuit Court of Appeals laying down such rules as it may deem necessary for the guidance of that court, for on any basis of *quantum meruit* the allowance of $25,000 to the referee for his services was so excessive as to be a grave abuse of discretion.

Dated, February 1, 1936.

Respectfully submitted,

STANLEY REED,
Solicitor General

JAMES B. ALLEY,
General Counsel, Reconstruction Finance Corporation

MAX O'RELL TRUITT,
Solicitor, Reconstruction Finance Corporation

ELI WHITNEY DEBEVOISE,
FRANCIS T. P. PLIMPTON,
Special Counsel, Reconstruction Finance Corporation

HANS A. KLAGSBRUNN,
WILLIAM RADNER,
Attorneys, Reconstruction Finance Corporation

Counsel for Respondent.

APPENDIX.

Statutory Provisions.

BANKRUPTCY ACT (U. S. Code, Title 11).

"Sec. 12. **Compositions, when confirmed.**—(a) A bankrupt may offer, either before or after adjudication, terms of composition to his creditors, after, but not before, he has been examined in open court, or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of the estate, at which meeting the judge or referee shall preside; but action upon the petition for adjudication shall not be delayed, except that the court, for good cause shown, may in its discretion delay such action upon such terms and conditions for the protection of and indemnity against loss by the bankrupt estate as may be proper.

"(b) An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

"(c) A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

"(d) The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors;

(2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

"(e) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided." (U. S. Code, Title 11, § 30).

"CHAPTER 5.—OFFICERS, THEIR DUTIES AND COMPENSATION."

"Section 33. **Creation of Two Offices.** The offices of referee and trustee are hereby created." (U. S. C., Title 11, § 61).

"Sec. 40. **Compensation of referees.**—(a) Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

(b) Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

(c) In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee." (U. S. Code, title 11, § 68).

"Sec. 72. **Compensation restricted.**—Neither the referee, receiver, marshal, or trustee shall in any form or

guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act." (U. S. Code, Title 11, § 112).

§ 3 of the Act of Congress of June 7, 1934.

"* * * The compensation allowed a receiver or trustee or an attorney for a receiver or trustee shall in no case be excessive or exorbitant, and the court in fixing such compensation shall have in mind the conservation and preservation of the estate of the bankrupt and the interests of the creditors therein." (§ 3 of the Act of Congress of June 7, 1934, 48 Stat. at L. 923, included in 11 U. S. Code Anno. as § 76a).

Section 77B—**Corporate Reorganizations.**

"(c) Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him * * * (11) may refer any matters to a special master, who may be one of the referees in bankruptcy, for consideration and report, either generally or upon specified issues, and allow such master a reasonable compensation and reimbursement for his services and actual and necessary expenses. * * *"

"(i) If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court, whether before or after this amendatory Act takes effect, a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section, and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee. If a receiver or trustee has been appointed by a

Federal or State or Territorial court prior to the institution of a proceeding under this section, and such proceeding shall be dismissed under subdivision (c), clause (8), of this section, the judge may include in the order of dismissal appropriate orders directing the trustee or trustees, or the debtor if no trustee is appointed, to transfer possession of the debtor's property within the territorial jurisdiction of such court to the receiver or prior trustee so appointed, upon such terms as the judge may deem equitable for the protection of obligations incurred by any trustee or trustees appointed under this section, and for the payment of administrative expenses and allowances in the proceeding hereunder. For the purposes of this section the words 'Federal court' shall include the district courts of the United States and of the Territories and possessions to which this amendatory Act is or may hereafter be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska, and the District Court of the United States for the Territory of Hawaii." [U. S. Code, Title 11, § 207 (i)].

"(k) If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section: (1) The case may be referred to a referee as provided in section 22, who shall be compensated as provided in section 40; (2) the first meeting of creditors shall be held as provided in section 55, upon notice as provided in section 58; (3) a trustee or trustees shall be appointed as provided in section 44, and be compensated as provided in section 48; (4) claims which are provable under section 63 may be proved as provided in section 57, except that the time within which proof may be made shall not expire until six months after the date of the last publication of the notice of the first meeting; (5) debts shall be entitled to priority as provided in section 64; (6) sales shall be made as provided in subdivision (b) of section 70; (7) dividends may be declared and paid as provided in section 65. None of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j), and (m) of section 57, and subdivisions (a) and (e) of section 70, shall apply to proceedings instituted under this section 77B unless and until an order has been entered directing the trustee or trustees to

liquidate the estate. All other provisions of this Act, except such as are inconsistent with the provisions of this section 77B, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors.' 'Bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequences and effect as an order of adjudication." [U. S. Code, Title 11 § 207

p. 1, 3, 5

SUPREME COURT OF THE UNITED STATES.

Nos. 539 and 540.—October Term, 1935.

Stephen Callaghan, Percival E. Jackson and William M. Greve, Individually and as Trustees, Etc., Petitioners, 539 *vs.* Reconstruction Finance Corporation. Theodore Stitt, Petitioner, 540 *vs.* Reconstruction Finance Corporation.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 2, 1936.]

Mr. Justice Stone delivered the opinion of the Court.

Nos. 539, 540.

In these cases certiorari was granted,—— U. S. ——, because of the public importance of the questions involved, to review the interpretation by the Court of Appeals for the Second Circuit, 79 F. (2d) 187, of the provisions of § 77 B of the Bankruptcy Act governing allowances to trustees and referees in bankruptcy for their services in bankruptcy proceedings when they are superseded by reorganization proceedings under that section. Number 539, which relates to the allowances of the trustees in bankruptcy, and No. 540, which relates to the compensation of the referee in bankruptcy, will be separately considered.

No. 539.—*Allowances to Trustees in Bankruptcy.*

Petitioners were trustees in a bankruptcy proceeding which was superseded by a proceeding to reorganize the debtor under § 77 B. The referee in bankruptcy fixed their compensation at $60,000, which the district judge sitting in bankruptcy increased to $90,000. The same judge sitting in the reorganization proceeding ordered payment of this allowance. The Court of Appeals reduced it to $14,628.50, computed, as provided by § 48 (a) and (e) of the Bankruptcy Act, upon the basis of cash disbursed by them. It

held that § 77 B (i) requires that allowances to trustees, for their services in the bankruptcy proceeding, be fixed in conformity to § 48, and that the reorganization court, in so far as it finds them reasonable, direct their payment from the property of the debtor.

Section 77 B (i) provides: "If a receiver or trustee of . . . the property of a corporation has been appointed by a federal, state or territorial court," and appropriate proceedings for a reorganization are afterward had under § 77 B, the trustee or receiver appointed in the reorganization proceedings, or the debtor if no trustee is appointed, "shall be entitled forthwith to possession of such property and vested with its title," and, "the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver and prior trustee, and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee."

It is the contention of petitioners that § 77 B (i), when bankruptcy is superseded by reorganization, authorizes the bankruptcy court to fix reasonable allowances for trustee's services, unrestricted by § 48 or other provision of the Bankruptcy Act, and that it requires payment of the allowances thus fixed except that the reorganization court may reduce them if it finds them excessive.

Petitioners thus construe § 77 B (i) as substituting the test of reasonableness for all other statutory restrictions upon the authority of the prior court to compensate trustees, a result which is reached by reading "reasonable" as qualifying the authority to fix compensation given by § 77 B (i) to the appointing court. They argue that § 48 was intended only to apply to bankruptcies in which liquidation results; that when, because of the intervening reorganization proceeding, liquidation does not result, § 77 B (i) makes a new grant of power to the court appointing the trustee to fix reasonable allowances without reference to the limitations of § 48; that the interpretation of the court below is inadmissible because of the hardship of inadequate allowances which would ensue in some instances if it were accepted.

We think these arguments ignore the words of § 77 B (i), the policy disclosed by its legislative history, and the policy as well of the Bankruptcy Act, of which it is an integral part. It is the judge in the reorganization proceeding who is to order payment

of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing the "prior trustee." Plainly the word "reasonable" seems designed, by qualifying the action of the judge ordering the payment, to enable him to require that allowances, which the statute permits the prior judge to fix, shall not exceed the limit of reasonableness. Compare *Taylor* v. *Sternberg*, 293 U. S. 470; *Gross* v. *Irving Trust Co.*, 289 U. S. 342; *Hume* v. *Meyers*, 242 Fed. 827. Only by a strained construction can it be read as a new grant of power to the latter, by qualifying his action and impliedly relieving him of existing limitations upon his authority to make allowances for services rendered by officers of his own court.

That such a grant of power was not intended is evident from the fact that the section applies to the administrative expenses incurred in state court proceedings as well as in bankruptcy. It would require compelling language to justify the conclusion that Congress has undertaken to enlarge or alter the powers of state courts to fix allowances for their own administrative expenses because payment of them is to be effected by a federal court to which the proceeding has been transferred.

In interpreting the section, it is of importance that it is a part of the Bankruptcy Act, to be read with the other sections relating to allowances, and that the allowances are compensation for officers of the court and for expenses incurred in the course of a judicial proceeding conducted for the purpose, among others, of protecting the interests of creditors in the debtor's property. Trustees in bankruptcy are public officers and officers of a court, and "the officers of a court, like public officers generally, must show clear warrant of law before compensation will be owing to them for the performance of their public duties." *Realty Associates Securities Corp.* v. *O'Connor*, 295 U. S. 295, 299.

It has been the consistent policy of Congress that proceedings in bankruptcy and under § 77 B be economically administered. This is evidenced by explicit limitations in §§ 40, 48 of the Bankruptcy Act on fees of referees, trustees and receivers. To exact strict compliance with these sections, § 72 commands: "Neither the referee, receiver, marshal or trustee shall in any form or guise receive, nor shall the court allow him any other or further compensation for his services than that expressly authorized and pre-

scribed in this Act." In recognition of this policy, the limitations upon expenses prescribed by §§ 40, 48, have been strictly construed, even when the compensation allowed was, in special circumstances, materially less than that which otherwise might have been considered reasonable. See *Realty Associates Securities Corp.* v. *O'Connor, supra; In re Detroit Mortgage Corporation,* 12 F. (2d) 889; *American Surety Co.* v. *Freed,* 224 Fed. 333; compare *In re Consolidated Distributors, Inc.,* 298 Fed. 859; *In re Curtis,* 100 Fed. 784, 792. Occasional hardship to the individual is a consideration outweighed by the public interest and the declared policy of Congress.

One of the controlling reasons for the enactment of § 77 B was the desire to reduce the costs of reorganization. See *Continental Illinois National Bank* v. *Chicago, R. I. & P. R. R. Co.,* 294 U. S. 648, 685; Report No. 194, House Judiciary Committee, June 2, 1933, 73rd Cong., 1st Sess.; Report No. 482, Senate Judiciary Committee, March 15, 1934, 73rd Cong. 2d Sess. Section 76, enacted at the same time as § 77 B, provides: "The compensation allowed . . . a trustee shall in no case be excessive or exorbitant and the court, in fixing such compensation, shall have in mind the conservation and preservation of the estate of the bankrupt, and the interest of the creditors therein." Where the attempted reorganization results in liquidation, §§ 40, 48, regulating the fees of referees, receivers and trustees in bankruptcy, are incorporated by reference in § 77 B (k), and are likewise made to control the fees of such officers in the reorganization proceedings.

In all this we find convincing evidence that the settled policy of the Bankruptcy Act, and its specific restrictions upon the allowances to officers, were not to be disturbed by the inclusion, in a new provision for the transformation of an insolvency proceeding into one for reorganization, of permission to the judge in the former to fix allowances. Only amendatory language plainly indicating a purpose to disregard the restrictions of §§ 40, 48, would justify a different conclusion.

No. 540.—*Allowances to the Referee in Bankruptcy.*

Petitioner was the referee in the proceeding in bankruptcy which was superseded by the reorganization proceeding. The district judge allowed him $25,000 for his services in the bankruptcy proceeding, and the same judge, sitting in the reorganization pro-

ceeding, ordered it paid. The Court of Appeals reduced the allowance to $1,038.00, computing it in accordance with § 40 of the Bankruptcy Act. As there had been no disbursement to creditors, the allowance was limited by § 40 to a filing fee and commissions on creditors' claims filed. Adopting the same conclusion which we have reached in No. 539, petitioner does not contend that § 77 B (i) is authority for disregarding the limitations of the other sections of the Bankruptcy Act upon allowances for administration expenses. But he insists that reorganization under § 77 B is a confirmation of a composition so that he is entitled to the allowance authorized by § 40 (a) of "one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

He also relies on § 40 (c), which provides, "In event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee."

In view of the requirement, already discussed, of strict construction of sections of the Bankruptcy Act fixing fees and allowances of officers, we think neither of the contentions of petitioner is admissible. Section 40 was enacted long before § 77 B, when § 12, dealing *eo nomine* with compositions in bankruptcy, was a part of the Act. Reorganizations now permitted under § 77 B present certain resemblances to compositions under § 12, which have been commented upon as supporting the constitutionality of the reorganization provisions of § 77 or § 77 B. *Continental Ill. Nat. Bank* v. *Chicago, R. I. & P. R. Co., supra; In re Central Funding Corp.*, 75 F. (2d) 256; *Campbell* v. *Allegheny Corp.*, 75 F. (2d) 947. But § 77 B contemplates a procedure and results not permissible under § 12. Reorganizations are nowhere referred to in the statute as compositions. Section 77 B (c) (11) applies a different standard of compensation for the master appointed in a reorganization proceeding, with duties corresponding to those of a referee in bankruptcy, from that established by § 40. If reorganization is abandoned in favor of liquidation, a referee may be appointed to whose compensation § 40 is expressly made applicable by § 77 B (k). These are persuasive reasons for concluding that neither § 40 nor § 77 B is to be construed as recognizing that a reorganization is the equivalent of a composition for the purpose of fixing referees' fees under § 40 (a).

Section 40 (c) relates only to the allocation of fees allowed under § 40 (a) in the event that the reference is revoked or the case is specially referred. But here the reference has not been revoked nor the case specially referred, and, for reasons already given, no fees to the referee in addition to those allowed by the court below are authorized under § 40 (a).

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.